SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 29

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., *Appellants,*

vs.

J. MILLARD TAWES, GOVERNOR, ET AL., *Appellees.*

BRIEF FOR APPELLANTS ON APPEAL FROM THE COURT OF APPEALS FOR MARYLAND

ALFRED L. SCANLAN,
9806 Singleton Drive,
Bethesda, Maryland.

JOHN B. WRIGHT,
12 Church Circle,
Annapolis, Maryland.

SHEA & GARDNER,
734 15th Street, N.W.,
Washington 5, D. C.
Of Counsel.

JOHNSON BOWIE,
22 West Pennsylvania Ave.,
Towson 4, Maryland.
Attorneys for the Appellants.

August 22, 1963

IN THE

SUPREME COURT OF THE UNITED STATES

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION (in behalf of its members), 4907 Redford Road, Bethesda, Montgomery County, Md.; W. F. STRONG, 301 Hillmoor Drive, Silver Spring, Montgomery County, Md.; NEWTON I. STEERS, 6601 River Road, Bethesda, Montgomery County, Md.; JOHN DOHERTY, 12 Revell Street, Annapolis, Anne Arundel County, Md.; BRUCE L. BOWMAN, 1423 Laurel Hill Road, Greenbelt, Prince Georges County, Md.; ANDREW M. BRISTOW, 8168 Glen Gary Road, Baltimore County, Md.; and SAMUEL HOPKINS, 4302 Wendover Road, Baltimore, Md., *Appellants*,

vs.

J. MILLARD TAWES, Governor, State House, Annapolis, Md.; BOARD OF STATE CANVASSERS, State House, Annapolis, Md.; LLOYD SIMPKINS, Secretary of State and Member of the BOARD OF STATE CANVASSERS, State House, Annapolis, Md.; LOUIS L. GOLDSTEIN, Comptroller and Member of the BOARD OF STATE CANVASSERS, State House, Annapolis, Md.; THOMAS B. FINAN, Attorney General and Member of the BOARD OF STATE CANVASSERS, State House, Annapolis, Md.; HOOPER S. MILES, Treasurer and member of the BOARD OF STATE CANVASSERS, State Office Building, Annapolis, Md.; and JAMES LLOYD YOUNG, Clerk, Court of Appeals, and member of the BOARD OF STATE CANVASSERS, Court of Appeals Building, Annapolis, Md.; and BOARD OF ELECTION SUPERVISORS, Anne Arundel County, Court House, Annapolis, Md., *Appellees.*

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vs.

J. MILLARD TAWES, GOVERNOR, ET AL., *Appellees*.

BRIEF FOR APPELLANTS

Opinions Below

The first pertinent opinion of the Circuit Court for Anne Arundel County, Maryland is unofficially reported in *The Daily Record* (Baltimore), May 28, 1962, p. 1, and is printed at R. 100. A second opinion of the same court is unofficially reported in *The Daily Record* (Baltimore), July 2, 1962, p. 3, and is printed at R. 113. An earlier opinion of the Court of Appeals for Maryland in this case, issued on April 25, 1962, is reported at 228 Md. 412, 180 A. 2d 656. The decision of the Circuit Court of Appeals for Maryland from which this appeal has been taken is reported at 229 Md. 406, 184 A. 2d 715, and is printed at R. 162.

Jurisdiction

The judgment of the Court of Appeals for Maryland initially was entered on July 23, 1962 in the form of a *per curiam* order, with three of seven judges dissenting (R. 124), 229 Md. 317, 182 A. 2d 877. A timely motion for reargument was denied, without opinion, on September 11, 1962 (R. 125). The majority and dissenting opinions of the Court of Appeals for Maryland were issued on September 25, 1962 (R. 162). A notice of appeal was filed on September 28, 1962 (R. 193), and the appeal was docketed on October 24, 1962. This Court noted probable jurisdiction on June 10, 1963, 374 U.S. 804. Jurisdiction of the Court rests on 28 U.S.C. 1257(2) and 28 U.S.C. 2101(e).

Statutes and Constitutional Provisions Involved

This case involves:

(1) Section 1 of the Fourteenth Amendment to the Constitution of the United States, containing the equal protection and due process clauses, which are printed in Appendix A, *infra*, p. 76.

(2) Section 2, and former Section 5, of Article III of the Maryland Constitution, which are printed in Appendix A, *infra*, p. 76.

(3) Chapter 1, Acts of the 1962 Special Session of the Maryland General Assembly, approved May 31, 1962, and now found as Article 40, Section 42, Code of Maryland (1962 Supp.), which is printed in Appendix A, *infra*, p. 77.

Questions Presented

1. Are the appellants and other citizens and eligible voters who reside in the five most populous subdivisions of the State of Maryland being subjected to invidious discrimination and unreasonable dilution in the exercise of their

rights of suffrage, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, through the representation afforded them in the Maryland General Assembly by Section 2 of Article III of the Maryland Constitution, which provision allows the five most populous political subdivisions, containing 76% of the population of Maryland, only 34% of the total membership of the State Senate, and permits a minority of 14% of the population of the State residing in the less populous political subdivisions thereof to elect a majority of the members of the Maryland State Senate?

2. Are equal protection and due process of law, as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, being denied appellants and other citizens and voters of Maryland similarly situated, by the total representation now provided for in both Houses of the Maryland General Assembly, and under which citizens residing in the five most populous political subdivisions of the State, comprising 76% of Maryland's population, by virtue of Article 40, Section 42, of the Maryland Code and Section 2, Article III, of the Maryland Constitution, are afforded only 55% and 34%, respectively, of the present membership of the Maryland House of Delegates and State Senate, with 35% of the population in a position to elect a majority of the House of Delegates and, as stated above, 14% able to elect a majority of the State Senate?

Statement of the Case

The appellees first demurred to the allegations of the bill of complaint after it was filed in August, 1960 (R. 50-52). In its first decision in this case, the Court of Appeals for Maryland reversed the trial court's overruling of the demurrers. 228 Md. 412, 180 A. 2d 656. Appellees' subsequent answers raised no disputed questions of material fact (R. 89-95). Following appellants' motion for sum-

mary judgment (R. 98), the case was decided by the trial court exclusively upon the pleadings and exhibits filed and argument of counsel, without the taking of testimony or the introduction of further evidence. The facts are these:

1. *Present Population of the State and Existing Representation in the Maryland General Assembly.* According to the official census, the 1960 population of Maryland was 3,100,689 (R. 97). At that time, the combined population of the five most populous political subdivisions of Maryland, which are the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges, and the City of Baltimore, was 2,336,409. At present, about 76% of the population of Maryland live in these five most populous political subdivisions, while approximately 24% of the population reside in the remaining 19 counties of the State (R. 189).[1]

Under Section 2 of Article III of the Maryland Constitution, each of the 23 counties of the State is given one Senator, with each of the 6 legislative districts of the City of Baltimore also entitled to one Senator. Until the Circuit Court for Anne Arundel County declared it to be in violation of the Fourteenth Amendment and null and void, Section 5 of Article III of the Maryland Constitution had prescribed the representation to be enjoyed in the House of Delegates by the various political subdivisions. The specific number of Delegates to which each political subdivision was entitled was expressly set forth in that section of the Maryland Constitution. Temporary legislation passed at a special session of the Maryland General Assembly held in May, 1962, has replaced the voided Con-

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[1] More recent official estimates place Maryland's population, as of July 1, 1961, at 3,191,000. *Current Population Reports*, Bureau of the Census, November 26, 1962, No. 259, p. 3. By 1970, it has been predicted, Maryland will have a population of 3,838,000, nearly 79% of whom will live in the present five most populous political subdivisions. *Maryland Population Forecasts, 1965 and 1970*, published by Md. State Planning Dept., November 1961, pp. 3, 7, 9, 11, 35, and 37.

stitutional provision. Art. 40, Sec. 42, Code of Md. (1963 Supp.), App. A, *infra*, p. 77. Representation in the House of Delegates now is expressly provided for in the statute which was enacted at the special session. The representation prescribed by the present statute has remained as previously authorized by Section 5 of Article III of the State Constitution, with the following exceptions: Baltimore County now has 13 instead of 6 Delegates; Montgomery and Prince Georges now have 10 Delegates each instead of 6 each; Anne Arundel County now has 7 instead of 6 Delegates; and the Third Legislative District of the City of Baltimore now has been given 8 Delegates and the Fifth Legislative District, 7 Delegates, rather than the 6 Delegates to which each of those two Districts formerly had been entitled under Section 5 of Article III of the State Constitution (App. A, *infra*, p. 76).

The four most populous counties and the six legislative districts of the City of Baltimore have one member each in the Maryland State Senate. This constitutes approximately 34% of the representation in the Senate (R. 189). The remaining 19 counties have one member each, or approximately 66% of the representation provided for in the upper chamber of Maryland. Prior to the filing of this suit, and until the enactment on May 31, 1962 of temporary reapportionment legislation at a special session of the General Assembly, the five most populous subdivisions of the State were allotted 60 Delegates, out of the 123 members of the House of Delegates. The 19 less populous counties were given 63 Delegates, or 51% of the total membership of the House of Delegates. At the present time, the five most populous political subdivisions are afforded 79 Delegates, or 55% of the total membership of the House of Delegates, while the remaining less populous counties continue to have 63 Delegates, which now make up 45% of the total membership of 142.

2. *Disparities of Representation in the Maryland State Senate.* Less than 15% of the population of Maryland can elect a majority of the State Senate. One Senator from Baltimore County, with a population at the present time of about 500,000 people (R. 189), is elected by more people than are required to elect a majority of the entire State Senate. If representation was based strictly on the 1960 population of Maryland, each Senator would represent approximately 106,000 people. On that basis, a citizen's vote for a State Senator in the most under-represented populous county of Maryland is worth only 3% of the vote of a resident from the most over-represented and least populous county (R. 189).

The four most populous counties, with a combined population now approximating 1,500,000, and constituting over 45% of the total population of the State, enjoy only 14% of the representation now provided in the State Senate by virtue of Section 2 of Article III of the Maryland Constitution (R. 189). As of January 1, 1964, population projections indicate that Montgomery and Prince Georges Counties will have a combined population of 850,000, or 25% of the State total, yet will have only 7% of the total representation in the Senate.[2] The City of Baltimore, with a little over 900,000 people, has 6 State Senators, while the four most populous counties previously referred to, with nearly 1,500,000 people, have a combined total of 4. Substantial disparities in Senate representation also exist within the class of the less populous political subdivisions. For example, one county with a 1960 population slightly

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[2] The research director of the Urban Land League recently predicted that by 1970, metropolitan Washington, including Montgomery and Prince Georges Counties, will have a population of 2,725,000, and by 1980 a population of 3,500,000. *Washington Post & Times Herald*, June 30, 1963, p. A-1. As of January 1, 1963, Montgomery's population had almost reached 390,000, while that of Prince Georges was just a few hundred short of 425,000. *Washington Evening Star*, August 11, 1963, p. B-3.

in excess of 90,000 people has 1 State Senator, while another county with a population of less than 17,000 also has 1 (R. 189). The Senator from Montgomery County represents more than 22 times as many persons as the Senator from Kent County. Each year the population of Montgomery County is increasing by more than the entire present population of Kent County. Latest projections by the United States Census Bureau indicate that Montgomery County's population will reach 695,000 in 1980. This would represent an increase of 354,704 over that county's 1960 population. *Bethesda-Chevy Chase Tribune*, August 2, 1963, p. 1. Kent's 1960 population was 15,317.

3. *Present Representation in the House of Delegates.* Immediately after a decision rendered on May 24, 1962 by the Circuit Court for Anne Arundel County, declaring Section 5 of Article III of the Maryland Constitution to be in violation of the Fourteenth Amendment, a special session of the General Assembly of Maryland was convened. On May 31, 1962, the special session passed temporary, "stop-gap" legislation, adding 19 new Delegates to the House of Delegates, temporarily raising its membership to 142.[3] As stated, Baltimore County was allotted 7 of the new Delegates, Montgomery County and Prince Georges, 4 each, Anne Arundel County, 1, the Third Legislative District of the City of Baltimore, 2, and the Fifth Legislative District, 1 additional Delegate. Before the enactment of this special legislation, the maximum dilution in voting rights which had existed among the political subdivisions in the House of Delegates was approximately 12 to 1. This maximum has now been reduced to 6 to 1.

[3] Art. 40, Sec. 42, Code of Md. (1962 Supp.). Unless superseded by an amendment to the Maryland Constitution, the temporary legislation enacted by the special session will automatically expire on January 1, 1966. (App. A, *infra*, p. 86). An amendment requires that three-fifths (3/5ths) of each house of the General Assembly approve the referendum before it can be submitted for a vote of the electorate. Art. XIV, Sec. 1 of the Maryland Constitution.

The five most populous political subdivisions, in which 76% of the population live, at present have 55% of the total representation in the House of Delegates. Unlike the United States House of Representatives, where only 5 out of 436 Congressional seats, or 1%, fail to meet the minimum average population requirement, some 33, or 23%, of the total of 142 seats in the House of Delegates are allotted the less populous political subdivisions apart from the 30 seats to which they are entitled on a straight population basis. On any basis of a minimum population ratio requirement, these areas would not be entitled to those additional 33 Delegates.

The four suburban counties, with approximately 45% of the State's population, are given about 28% of the representation in the present 142 member House of Delegates. If representation were based on population, but permitting at least one Delegate for every County, the five most populous subdivisions would be entitled to 105 Delegates out of the 142 for which provision was made by the Act of May 31, 1962, rather than the 79 seats they now have. The 19 less populous counties, on the other hand, would be entitled to no more than 37 Delegates, rather than the 63 which they now have.

If the ten Delegates to which Montgomery County is entitled in the House of Delegates were subtracted from the 79 seats now held by representatives of the five most populous areas, the result would be that political subdivisions containing 35% of the population of Maryland could elect 73 of the 142 members of the House of Delegates, while a minority of 69 seats in that House would be elected by political subdivisions containing 65% of the State's population.

4. *Revenues Contributed and State Funds Returned.* In Maryland, significant portions of the revenue collected by the State from various types of taxes are returned to the

local political subdivisions on the basis of equalization formulae enacted by the General Assembly (R. 7, 23). Under most of these formulae, the five most populous political subdivisions contribute proportionately greater tax revenues, yet receive proportionately less funds back from the State, than do the less populous political subdivisions. For example, in 1959 under the equalization formula controlling the return of funds collected through the motor vehicle fuel tax, Anne Arundel, Baltimore, Montgomery and Prince Georges Counties, in which approximately 47% of the motor vehicles of Maryland are registered, received back approximately 12% of this revenue returned by the State (R. 7).

For the fiscal year which ended on June 30, 1959, Anne Arundel, Baltimore, Montgomery and Prince Georges County and the City of Baltimore contributed 84% of the Maryland income tax collected (R. 7). These political subdivisions, during that same year, also paid in 73% of the sales and use taxes, 83% of the corporation finance tax, and 70% of the business license revenue collected (R. 7). The same four counties, along with the City of Baltimore, also provided 72.4% of the revenue derived in 1959 from motor vehicle registration fees (R. 7).

5. *Futile Efforts to Have the Legislature Reapportion Itself in the Absence of a Controlling Court Decision.* Neither in the Maryland Constitution nor in the statutes is there any provision for reapportioning the General Assembly. The Maryland Constitution does not provide for the initiative. For an amendment to the State Constitution to be submitted to the people on referendum, a vote of three-fifths of both houses of the legislature is first required.[4] Aside from the limited and temporary reapportionment of the House of Delegates enacted at the 1962

[4] Art. XIV, Section 1, of the Maryland Constitution.

special session, following the decision of the trial court in striking down Section 5 of Article III of the Maryland Constitution, since 1867 all efforts to obtain a substantial reapportionment of the General Assembly, with two other exceptions, have been futile. In 1900, the City of Baltimore, because of its expanding population, was given an additional State Senator and an additional legislative district, making a total of 4 Senators and legislative districts; 2 more Senators and 2 more legislative districts were added to Baltimore's representation in 1922.[5] Apart from these increases of Senate representation for the City of Baltimore, membership in the Maryland State Senate remains as provided for in the Constitution of 1867. Until 19 Delegate seats were created and distributed among the five most populous political subdivisions at the 1962 special session of the Maryland General Assembly, representation in the House of Delegates was authorized on the basis of a limited population formula adopted in the Constitution of 1867. However, a ceiling was imposed in 1950 which froze representation in the lower House on the basis of representation established in reliance on the Federal census of 1940. The purpose of this amendment was to prevent the smaller counties from continuing to receive increased representation at the further expense of the larger political subdivisions which, under the 1867 formula, were not entitled to any more than 6 Delegates once their population had reached 55,000, no matter how much it might increase thereafter. 228 Md. 412, 435, *f.n.* 11, 180 A.2d 656, 669, *f.n.* 11.

From 1951 through 1960, 11 proposals were introduced in the Maryland General Assembly to reapportion only the House of Delegates. None were enacted. Nor did any move so far as to reach a final vote on the merits. (R. 28-29). Nearly a dozen reapportionment amendments were

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[5] Bell, The Legislative Process In Maryland (Univ. of Md., 1958), p. 15.

introduced at the 1961 and 1962 regular sessions of the Maryland General Assembly. None of these passed.

While the Constitution of Maryland provides that the General Assembly is to provide for "taking the sense of the people" in regard to calling a constitutional convention every twenty years,[6] no Constitutional Convention has been convened since 1867. A Constitutional Convention would have the power to propose amendments to the Maryland Constitution, including amendments to reapportion representation in the General Assembly. Although in November, 1950, the electorate approved the calling of a Constitutional Convention by a vote of 200,439 to 56,998, the General Assembly has consistently declined to convene it (R. 14). Legislation proposing that a convention be summoned was introduced at sessions of the General Assembly held in 1951, 1954, 1955, 1957, 1960, 1961 and 1962. None of these proposals were enacted (R. 14). One convention bill passed the House of Delegates in the closing days of the 1961 legislative session. However, after legislators from the less populous subdivisions had attacked the proposal as a "frightening device" to secure reapportionment, the convention bill was defeated in the State Senate by a vote of 17 to 11, all the Senators but one from the less populous counties voting against it.[7]

6. *Proceedings Below.* Appellants, with one exception all citizens and eligible voters of Maryland residing in the five most populous areas, filed their bill of complaint in the Circuit Court for Anne Arundel County, Maryland on August 12, 1960. Defendants are the election officials of

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[6] Art. XIV, Section 2, of the Maryland Constitution. Representation in a Constitutional Convention, if the legislature finally did convene one, would be on the same basis of representation as now exists in the General Assembly itself.

[7] *Washington Evening Star*, March 30, 1961, p. B-2; *ibid*, April 2, 1961, p. B-2.

the State of Maryland and of Anne Arundel County (R. 2). Plaintiffs sought a declaratory judgment that the existing representation as then provided in the Maryland House of Delegates and State Senate by virtue of Sections 2 and 5 of Article III of the Maryland Constitution violated Section 1 of the Fourteenth Amendment.[8] In addition to seeking declaratory relief, appellants asked for injunctive relief against the conduct of the 1962 elections to the Maryland General Assembly "and thereafter" (R. 20).

Appellees' demurrers were sustained by the trial court on February 21, 1961 on the grounds that issues presented raised political questions beyond the jurisdiction of the court to decide. On appeal to the Court of Appeals for Maryland, this first decision of the Chancellor was reversed, and the case remanded for determination of the federal questions presented. 228 Md. 412, 180 A. 2d 656. Upon remand, and after the appellees had answered the bill of complaint, but had not disputed any of its material allegations, the case was again heard by the trial court on appellants' motion for summary judgment (R. 102). On May 28, 1962, the Chancellor entered an order declaring Section 5 of Article III of the Maryland Constitution, which provided for representation in the House of Delegates, to be in violation of the Fourteenth Amendment and null and void (R. 110). However, he attempted to reserve judgment with respect to the constitutionality of the representation provided in the Maryland State Senate by virtue of Section 2 of Article III of the Maryland Constitution.

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[8] Appellants also contended that the failure to reapportion the Maryland General Assembly violated certain provisions of the Maryland Constitution and the Maryland Declaration of Rights. These issues of State law are no longer in the case. *Maryland Comm. for Fair Rep.* v. *Tawes*, 228 Md. 412, 425, 180 A. 2d 656, 662. Since there were individual plaintiffs, appellees' challenge to the standing of the Committee for Fair Representation, the non-individual plaintiff, was resolved in favor of the latter's standing to sue, 228 Md. 412, 420, f.n. 5, 180 A. 2d 656, 660, f.n. 5.

Appellants took an appeal from the May 28, 1962 decision on the day it was issued (R. 111). The Court of Appeals then directed that the lower Court promptly determine the issue of the constitutionality of Section 2 of Article III. On June 28, 1962, the Circuit Court for Anne Arundel County issued a decree and filed an opinion holding that the present representation in the Maryland State Senate did not violate the Fourteenth Amendment. Appellants immediately appealed to the Court of Appeals for Maryland (R. 123).[9]

The Court of Appeals heard the case in a special session held on July 23, 1962. In the afternoon of that day, the Court issued a *per curiam* order, with three judges dissenting, affirming the judgment of the trial court (R. 124). A timely motion for reargument was denied on September 11, 1962 (R. 125). On September 25, 1962, the Court filed its opinion, three judges dissented, and two dissenting opinions were filed, one written by Chief Judge Brune, the other by Judge Prescott (R. 171, 190).

7. *The Decision of the Court of Appeals for Maryland.* In deciding adversely to the petitioners, the four judge majority opinion of the Court of Appeals for Maryland held: that (1) "the counties of Maryland always have been an integral part of the state government" (R. 165); (2) that while the counties of Maryland are not sovereign, "traditionally [they have] exercised wide governmental powers," and in this respect are "quite analagous to the states, in relation to the United States" (R. 166); (3) that the mode of selecting United States Senators "was modeled, to a considerable extent" upon the method of indirect election of members of the Maryland Senate, as this system existed prior to 1837 (R. 166); and (4) that "historical prece-

[9] Appellants' earlier appeal of the trial court's decision of May 28, 1962 was aborted when the Court of Appeals remanded the case to the Chancellor with directions to determine the Senate question promptly (R. 112).

dents" furnished "a complete justification" for the present manner of selecting members of the Maryland Senate (R. 167).

On these basic grounds, the majority concluded that the so-called "Federal Plan," which obtains in the composition of the Congress of the United States, furnished a sufficient analogy to save the representation afforded in the Maryland Senate by virtue of Article III, Section 2, of the Maryland Constitution, from condemnation under Section 1 of the Fourteenth Amendment (R. 169).

Three judges dissented from the majority opinion, and two dissenting opinions were filed. Chief Judge Brune, in his dissent, noted: (1) that the Maryland House of Delegates is not yet apportioned on a basis which affords a "close relationship" between population and representation (R. 177); (2) that Maryland counties are "creatures of the State" (R. 177); (3) that any alleged pattern of a Federal plan in the composition of the Maryland General Assembly is substantially impaired by the additional representation which Baltimore has been given in the State Senate, that city now having six Senators in its delegation (R. 177); and (4) that there are limitations to the efficacy of attempting to rely on "history" as an alleged rational basis for "geographical representation without regard to present glaring disparities in population between areas." (R. 179).

Finding numerous gross disparities in senatorial representation, the dissenters concluded that the "limit to permissible discrimination is passed" in the composition of the Maryland State Senate (R. 179), and that the State had not met its burden to establish a rational basis with which to avoid the judgment that invidious and unconstitutional discrimination in voting rights exists in this case (R. 183).

Summary of Argument

I

A. Questions of jurisdiction, justiciability, and standing to sue are no longer issues in this case. *Baker* v. *Carr*, 369 U.S. 186, resolved those questions for the nation as a whole, and the Court of Appeals for Maryland has applied that ruling in an earlier decision in these same proceedings. *Maryland Committee for Fair Representation* v. *Tawes*, 228 Md. 414, 428, 180 A. 2d 656, 664.

B. It is an undisputed proposition that a voter's right to cast a ballot without unfair impairment or invidious discrimination in its exercise is protected by the Fourteenth Amendment. *Gray* v. *Sanders*, 372 U.S. 368, 375. *Baker* v. *Carr* surely has established that rights of suffrage are also protected from unreasonable dilution resulting from grossly unfair or malapportioned representation in a state legislature, whether the latter be the result of purposeful legislative action or inaction. If *Baker* does not mean at least this, truly it may be regarded as an exercise in futility, having no permanent effect on substantive constitutional law save the negative impact of permitting the continued existence of the national disgrace of gross malapportionment.

On the other hand, if *Baker* v. *Carr* means what it seems to imply, then unconstitutional discrimination in rights of suffrage exist as the result of the present composition of the Maryland State Senate as prescribed by Article III, Section 2, of the Maryland Constitution. Approximately 14% of the population of Maryland can elect a majority of the State Senate. On the other hand, 76% of the State's population receive only 34% of the representation in the State Senate. Numerous gross disparities exist, not only between classes of political subdivisions, but also within classes. For example, one county with a population of a

little over 90,000 has one Senator, while another less populous county with a little over 16,000 also has one Senator. On the other hand, the urban-suburban county of Baltimore, with approximately 500,000 people, has one State Senator, while Baltimore City, with a population slightly in excess of 900,000, is given six State Senators. These are glaring, but only representative, examples of the extent and scope of the gross disparities of representation which now prevail in the Maryland State Senate, not only as between different classes of political subdivisions, but also within the same class or classes thereof.

C. Gross malapportionment has existed in Maryland for a long time, and has grown steadily worse. Apart from the limited and temporary reapportionment of the House of Delegates enacted at a special session of the General Assembly in May, 1962, no substantial reapportionment has taken place since 1837, except that the City of Baltimore was given three legislative districts, including three Senators in 1864, received one more legislative district and one more Senator in 1900, and was allotted two more legislative districts and two more Senators in 1922. In 1937 it took 18.1% of the State's population to elect a majority of the 29 member State Senate; at present 14% of the population are now so favored; by 1970, 12% should be sufficient.

The citizens of the more populous political subdivisions of Maryland have tried, desperately and persistently, to break the stranglehold on state government which the representatives from the less populous areas have so long possessed. From 1951 through 1962, some 23 reapportionment bills were introduced in the General Assembly. None succeeded of passage. Similarly, no legislation approving a Constitutional Convention, which would have the power to submit constitutional amendments for approval by the voters, has been enacted since 1867, although many pro-

posals to convene a convention have been unsuccessfully introduced in the General Assembly.

The people of Maryland do not enjoy the right of initiative. They also are powerless to institute a proposed constitutional amendment, since this can only be done after three-fifths of the members of both Houses of the General Assembly have approved its submission to the electorate.

Maryland's experience confirms that of many other States. Legislative reapportioning *cannot* be expected in the absence of an authoritative judicial decision, but *can* be expected in the wake of such a decision. Unlike some of the difficult experiences which have accompanied lower courts' attempts to implement the school segregation decisions of this Court, there is no reason to expect that an authoritative ruling of the Court, followed by implementing decrees of the Maryland courts, will not be sufficient to induce the General Assembly to reapportion in a constitutional manner. The prior history of these same proceedings support that prediction.

D. Malapportionment represents more than mere mathematical unfairness or abstract injustice; it has important practical consequences as well. These have a far reaching impact on the nature of state government as well as the relationship of the States to the Federal Government, and even on the representation afforded in the House of Representatives of the Congress. Ultimately, therefore, gross malapportionment in the States has a direct effect on the national legislative process.

The scheme of malapportionment challenged in this case is especially familiar to the urban-suburban residents of most of the States of the Union. As one commentator has observed, "malapportionment strikes at one of the mainsprings of our democratic government." Tabor, *The Gerrymandering of State and Federal Legislative Districts*,

16 Md. L.R. 277, 303 (1956). One of the major consequences of what has been called "the rural stranglehold on State legislatures" has been the neglect of the pressing problems of the heavily populated urban and suburban areas. The decay of large cities, the neglected expansions of suburban areas, financial and planning crises in education, housing, transportation, water, sewage, urban redevelopment and civil rights problems, furnish the unpleasant hallmarks of almost every metropolitan area in the United States. Lewis, *Legislative Apportionment in the Federal Courts*, 71 Harv. L.R. 1057, 1058 (1958).

In Maryland, as in many other States, domination of the legislature by the less populated subdivisions has meant substantial discrimination in the form of tax and revenue preferences afforded the residents of those less populous areas at the expense of those living in the more populous subdivisions. Statutory formulae which control the manner and amount of the return of State funds to the local political subdivisions in Maryland invariably prefer the rural minority, whose representatives in the General Assembly resist all efforts to revise the formulae.

Another major adverse practical effect of malapportionment in Maryland is the inability to secure a Constitutional Convention for the purpose of revising Maryland's 100 year old Constitution, now cluttered with unnecessary, detailed and prolix provisions, which should be in the statutes and not proliferating the basic charter of State Government. Despite the overwhelming sentiment expressed in the 1950 election in favor of a Constitutional Convention, the General Assembly has consistently refused to enact the enabling legislation required. The reason is no secret; a Constitutional Convention would have the power to revise the provisions of the Maryland Constitution which perpetuate grossly disproportionate representation, especially in the State Senate. *Baltimore Morning Sun*, December 12, 1950,

p. 16; *Washington Post & Times Herald*, December 13, 1962, p. B-7.

E. Of course, not every discrimination is invidious, and legislative action is entitled to the presumption of constitutionality. *McGowan* v. *Maryland*, 366 U.S. 420, 426. Nevertheless, where fundamental liberties are involved, "there are limits to the extent to which the presumption of constitutionality can be pressed." *Skinner* v. *Oklahoma*, 316 U.S. 535, 544. These limits have been passed in this case, and the State has not met its burden of explaining or establishing a rational basis for the gross discrimination in rights of suffrage which prevail as a result of the representation now afforded in the General Assembly.

Moreover, appellants find hope, as well as support, in this Court's decision in *Gray* v. *Sanders*, 372 U.S. 368. If the "concept of political equality," as protected by the Fourteenth Amendment, applies to the counting of votes cast for executive officials in a state-wide election, it is very difficult to see why it should be any less applicable in the protection it affords to votes cast for legislative representatives. *New York Times* (Western Ed.), March 21, 1963, p. 6. One man cannot enjoy ten times the voting power of another, wherever he may reside. In the Maryland State Senate, discriminatory weighting of representation reaches 32 to 1. This, as the dissenting opinion below stated, "exceeds the permissible limit."

II

A. The trial court and the Court of Appeals for Maryland apparently found historical, if not legal, analogy in Article 1 of the Federal Constitution sufficient to justify the gross disparities now tolerated in the representation provided in the Maryland State Senate. The short answer is that, as a matter of pure and unchallenged historical

fact, at least since 1864, Maryland has not observed a Federal plan or a system of representation fairly analogous to such a plan. It is true that from 1776 to 1837, the House of Delegates was popularly elected, while Senators were indirectly elected by a college of electors. However, Maryland's early experience with a Senate elected on a basis of suffrage completely different from that of the lower House proved not to be very salutary. Within a few years, serious discord between the two Houses brought the State to the brink of armed conflict. Finally, in 1837, after a titanic constitutional and political struggle, the indirect election of Senators was abolished and the State Senate was made a popularly elective body by direct vote of the people, with one Senator from each county and one from the City of Baltimore. Radoff, The Old Line State (Historical Record Assoc.; 1956), pp. 43-64; Bell, The Legislative Process in Maryland (Univ. of Md., 1958), p. 11.

Beginning in the early 19th Century and extending to 1864, a number of attempts were made to change the basis of representation in the General Assembly. Usually, these efforts were undertaken by the Delegates from Baltimore City (which was growing very rapidly in population), with the assistance of the representatives of the expanding counties of Western Maryland. However, the Federalists and their successors, the Whigs, were able to resist the enactment of these proposals. In doing so, they expressed continued alarm over the burgeoning population of Baltimore and its large percentage of foreign born, and therefore suspected, citizens. Steiner, Citizenship and Suffrage in Maryland, (Baltimore: Cushing & Co., 1895), p. 32.

Finally, however, in the Constitutional Convention of 1864, convened while Maryland was under the yoke of the Union Army, Baltimore City was given additional representation in the form of three legislative districts, including one Senator for each of the three districts. The Constitu-

tional Convention of 1867 confirmed the increased representation which Baltimore had received in the 1864 convention.

In 1900, Baltimore received an additional legislative district and one more Senator. It was given this additional representation solely because of its expanding population. *Baltimore Sun*, February 14, 1900, p. 8. By 1920, when its population had reached 51% of the State's total, Baltimore was awarded two more legislative districts, including two more State Senators, making a total of six Senators, the representation which the City enjoys in the General Assembly at present. Again, the additional representation given Baltimore was solely because of the growth of the City's population. Bell, The Legislative Process in Maryland (Univ. of Md., 1958), p. 15.

Since 1864, therefore, at least so far as the City of Baltimore is concerned, population has been taken into some account in the representation permitted in the Maryland State Senate. Having been applied, the population factor must be invoked on a rational basis. Their expanding populations require that the other urban and suburban areas of Maryland be entitled to the same treatment which Baltimore has been given in the past. Anything less than such treatment is clearly to pursue or to permit the invidious discrimination within a class which the Fourteenth Amendment condemns.

In another important and distinctive respect, it is also established that no Federal plan has been adopted and adhered to by Maryland. Unlike the House of Representatives, the Maryland House of Delegates has *never* been based on population. At the present time, even allowing for the temporary "stop-gap" reapportionment of the House of Delegates, the four large suburban counties in Maryland, where 45% of the State's population live, are given only 28% of the representation in the House of Delegates. If a

true Federal plan had been followed in Maryland, the suburban counties and the City of Baltimore would be entitled to 105 Delegates out of the 142 member House; they have, however, only 79. 76% of the State's population still lack the voting strength (3/5ths of 142, or 86 members) to approve a constitutional amendment in even the House of Delegates. Population, to this day, never has been either the exclusive or the approximate basis of representation in the House of Delegates. In this second fundamental respect, the attempted Federal analogy also fails as a matter of history.

B. Even as a hypothetical analogy, however, a Federal plan for Maryland would not suffice to protect the present gross disparities of representation in the Maryland State Senate from condemnation as invidious discrimination. The so-called "Federal analogy" is more a desperate afterthought than a compelling argument. The early commentators on the structure of state government in America, who wrote during a period when many state constitutions were being drafted and revised, did not find analogy between the two-house state legislature and the Congress; see, *e.g.*, Bryce, I, *The American Commonwealth*, 484 (1917 ed.). The chief, if not the exclusive, justification for bicameralism in state government is that it insures against precipitate action. *Mann* v. *Davis*, 213 F. Supp. 577, 585 (E.D. Va., 1962), prob. juris. noted, 374 U.S. 803. The historical basis of Article I of the Federal Constitution, on the other hand, is well known to all students of American history. The Federal plan represented by Article I was the fruit of the reluctant compromise which the larger states in the Constitutional Convention were forced to accept in order to form the Union. Morgan, Birth of the Republic (Univ. of Chicago, 1956), p. 141; Farrand, The Framing of the Constitution of the United States, 105

(1913); Madison, *The Federalist Papers*, No. 62, American State Papers, 43 Great Books Ed., 189.

These historical reasons do not carry over to provide a rational basis for the grossly disproportionate representation which now exists in the Maryland State Senate. Maryland is not a federated republic; it is a unitary State. Its counties, and even more so, its legislative districts, are neither sovereign or quasi-sovereign bodies. 6 Md. Law Encycl. 497. As in other States, the counties of Maryland are completely dependent on the state legislature for both their existence and their continued exercise of governmental powers. *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178.

The Federal analogy, even if it had been applicable as a matter of historical fact to Maryland, would be insufficient in another material respect. Article I of the Federal Constitution, having been expressly written into that Constitution, cannot be attacked as unconstitutional, so far as the Federal Government is concerned. The Fourteenth Amendment, enacted 78 years later, and binding the States, not the Federal Government, permits, indeed sustains, a challenge to a Federal plan of representation so far as the States are concerned, where the application of such a plan or system of representation in a state legislature would sanction, as it would in Maryland, "invidious discrimination." *Scholle* v. *Hare*, 360 Mich. 1, 123, 104 N.W. 2d 63, reversed and remanded 369 U.S. 429.

Various federal and state courts have reached conflicting results regarding the alleged applicability of the Federal analogy in considering claims of disproportionate representation in state legislatures. This Court has not yet passed upon that precise issue. However, appellants hopefully read its decision in *Gray* v. *Sanders*, 372 U.S. 369, 378, as an indication that it will hold that the so-called analogy is "inapposite" in determining whether the representation

provided in a state legislature complies with the requirements of the Fourteenth Amendment.

III

From the beginning, the appellants have challenged the *total* representation afforded in the General Assembly of Maryland, as well as that provided in the State Senate considered as a separate house. The fundamental issue is the value of rights of suffrage possessed by the citizens of Maryland. Ultimately, this refers to the ability to pass legislation preferred by a majority. In a bicameral legislature, the enactment of legislation requires not a majority of all the legislators in both Houses, but a successive majority of the legislators in each House. *Sincock* v. *Duffy*, 215 F. Supp. 169, 171 (Del., 1963), appeal pending This Term, *sub nom. Roman* v. *Sincock et al*, No. 307.

A state legislature in which population is taken into account in one house and rejected in the other, guarantees government by paralysis and the frustration of the majority will. Maryland experienced that type of government at cross purposes once before, from 1776 to 1837. Now, 125 years later, Maryland has provided a political scientist's case study of the consequences of the stalemated government which can exist when the bases of legislative representation in the same body are so irreconcilably divergent. Of ten items of significant legislation considered at the 1963 session of the Maryland General Assembly, disagreement between the Senate, dominated by the less populous areas, and the House of Delegates, more responsive to the majority will, resulted in legislative deadlock with respect to seven of them. On the one hand, the House of Delegates passed by a comfortable margin legislation to outlaw the unit rule in primary elections; to reapportion the legislative districts of

the City of Baltimore on an equitable basis; to increase financial aid to the State's public school system; to increase credit availability for small loan purposes; and to develop Assateague Island as a public park. The Senate ignored or rejected all these House approved proposals. However, on the other hand, it found the opportunity to pass a bill to reapportion only the House of Delegates on a basis which within a few years would produce even more severe malapportionment than now prevails in that body, and to approve a radical proposal to amend the Federal Constitution in a manner that would permit the Congress to be by-passed in the amending process in the future. The 1963 session of the General Assembly demonstrates the absurdity of a state legislature in which the primary basis of representation in one house is population, but where the exclusive basis of representation in the other is area.

Appellants believe in bicameralism. However, for a bicameral legislature to operate as an effective instrument of state government, it cannot rest, as the Maryland General Assembly now does, on a structure of sharply divided and completely divergent representation, wherein one house represents people and the other represents only "geography," areas, units of local government, "history," or the once more equally populated political subdivisions of days long past. Locke, *Concerning Civil Government*, 35 Great Books Ed., 61. The basic purpose in having a two house state legislature is to insure that it is *more*, not *less* representative of the body politic. Accordingly, minority rule, even if allowed in just one house thereof, stultifies the legislative process, robs the principle of majority rule of any working vitality, and flouts both equal protection and due process of law.

IV

A. The overriding standard which should apply in all reapportionment cases is the principle of absolute equality of suffrage, or the same concept of "one man, one vote" which this Court adhered to in *Gray* v. *Sanders, supra*. Appellants perceive no substantial differences serving to distinguish a state electoral from a state representative process. However, if there are differences between voting in a state-wide primary and voting for representatives to a state legislature which are thought significant enough to justify some departure from the strict principle of electoral equality in the latter situation, such departures or deviations must be absolutely minimal. Under *all* circumstances, however, representation in at least one House of a state legislature must be based *exclusively* on population. *Toombs* v. *Fortson*, 205 F. Supp. 248 (N.D. Ga., 1962). The only extraneous factor which might be taken into account in permitting, in isolated cases and under compelling circumstances established by the state, some slight deviation from the strict population standard in *one* house *only*, possibly might be the long continued existence of instrumentalities of American local self-government, such as counties or towns. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 Mich. L.R. 645, 700, 1963. However, in permitting, in these rare cases, some minimal recognition for units of local self-government in *one* house of a state legislature, in no event should the disparities which would result therefrom be allowed to exceed a ratio of 1½ to 1, *Sincock* v. *Duffy*, 215 F. Supp. 169 (Del., 1963), and such minimal disparities should not be permitted as between political subdivisions of the same class, *Baker* v. *Carr*, 369 U.S. 186, 254.

Unless *Baker* v. *Carr* was intended to do no more than to establish procedural or jurisdictional points, however mini-

mal the standards which this Court ultimately chooses to lay down in reapportionment cases, the gross disparities of representation for so long tolerated in the Maryland General Assembly, and especially in the State Senate, violate the Fourteenth Amendment.

B. The history of these proceedings is proof that, should this court hold that the representation now provided in the General Assembly is unconstitutional, the Maryland General Assembly will act to correct it. The experience of over fifteen other States has been the same. Even though the judicial *minimum* will be the legislative *maximum*, there is the encouraging fact that many decisions of both State and Federal courts, whether voiding existing apportionment legislation or asserting jurisdiction to do so, have been followed, however reluctantly, by the passage of at least some legislative reapportionment. McKay, *supra*, pp. 706-710; *Washington Post & Times Herald*, March 24, 1963, p. C-1. The aftermath of a favorable decision in this case will be no different.

ARGUMENT

I

Invidious Discrimination Prevails in the Maryland State Senate

A. *Jurisdiction Is Settled.* Questions of jurisdiction, justiciability and standing to sue are no longer issues in this case. *Baker* v. *Carr*, 369 U.S. 186, resolved those questions for the nation as a whole, and the Court of Appeals for Maryland applied that ruling in an earlier decision in these same proceedings, 228 Md. 414, 428, 180 A. 2d 656, 664. Although *Baker* did not deal directly with the issue of justiciability in state judicial proceedings, apparently it has been accepted by the state courts as con-

trolling in those tribunals, as well as in federal courts. Malapportionment suits have reached the highest appellate courts of at least ten States since *Baker* v. *Carr* was decided. So far as appellants have been able to discover, no State court has dismissed such a suit for lack of justiciability. See, e.g., *Sweeney* v. *Notte*, (R.I.), 183 A. 2d 296.[10] There would no longer seem to be room for argument, therefore, that the Fourteenth Amendment does not protect against geographical discriminations proved to be invidious and resulting in grossly unreasonable dilution of the voting rights of citizens residing in the more populous areas of a State, whether that claim is asserted in a Federal or in a State court

B. *Gross Disparities of Representation Exist in the Senate.* It is an undisputed proposition that a voter's right to cast a ballot without unfair impairment or invidious discrimination in the exercise of suffrage is protected by the Fourteenth Amendment. *Gray* v. *Sanders*, 372 U.S. 368, 375; *Smith* v. *Allwright*, 321 U.S. 649; *Terry* v. *Adams*, 345 U.S. 461. Justice Brennan referred to this controlling principle in the majority opinion in *Baker* v. *Carr*, *supra*: A reading of his language, and an examination of Justice Clark's concurring opinion, as well as that of Justice Douglas, establishes that this Court will apply traditional Fourteenth Amendment concepts of reasonable classifications or distinctions in determining whether invidious discrimination, geographic, populative, or otherwise, exists in suffrage cases. As Justice Brennan said in *Baker*:

> "Their [plaintiffs'] constitutional claim is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitu-

[10] *The Discretionary Power of the Supreme Court to Dismiss Appeals from State Courts* (Note), 63 Columbia L.R. 688 (1963).

tion or any standard effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties. *A citizen's right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution,* when such impairment resulted from dilution for a false tally, *cf. United States* v. *Classic*, 313 U.S. 299; or by a refusal to count votes from arbitrarily selected precincts, *cf. United States* v. *Mosely*, 238 U.S. 383, or by a stuffing of the ballot box, *cf. Ex parte Siebold*, 100 U.S. 371; *U. S.* v. *Saylor*, 322 U.S. 385." (Emphasis added).[11]

Appellants believe that *Baker* v. *Carr* certainly did more than put to rest issues of jurisdiction and justiciability. We read that historic decision to establish that gross dilution of voting rights which results from unreasonable geographical discrimination, whether the result of purposeful legislative action or inaction, can exceed constitutional limits. If *Baker* does not mean at least this, truly it may be regarded as an exercise in futility, representing only judicial jousting over jurisdiction and justiciability, but intended to have and, indeed, having, no permanent effect on substantive constitutional law, save the negative impact of permitting the continued existence of the nationwide disgrace of gross malapportionment, at the curtailment or elimination of which many observers had believed this Court's historic ruling in *Baker* to have been directed.[12]

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[11] 369 U.S. 186, 208.

[12] *Baker* v. *Carr*, one commentator has said, "may . . . be taken as a watershed in American political history. Its symbolic significance is certainly as great as will be its practical effect." Kristol, *Social Science and Law*, Great Ideas Today (Ency. Brit., 1962), p. 222.

But if appellants are right and if, in Justice Clark's words, "incommensurables of both magnitude and frequency" in representation allowed in a state legislature give rise to "invidious discrimination," then such unconstitutional discrimination exists in the present composition of the Maryland State Senate provided for by Article III, Section 2, of the Maryland Constitution. Approximately 14% of the population of Maryland now hold a majority of the seats in that body. On the other hand, citizens of Maryland living in the more populous political subdivisions, where 76% of the State's population may be found, have only 34% of the representation in the State Senate. One Senator from Baltimore County represents an area whose population is greater than that which it takes to elect a majority of the entire State Senate.

Even within general classes of political subdivisions, gross discrepancies exist in the representation permitted. For example, Washington County, with a 1960 population of a little over 90,000, has one Senator; Queen Anne's County, with a 1960 population of a little over 16,000, also has one. On the other hand, the urban-suburban County of Baltimore, with approximately 500,000 people, has one State Senator, while the City of Baltimore, with a population of a little in excess of 900,000, is given six State Senators. The four large suburban counties of Anne Arundel, Baltimore, Montgomery and Prince Georges, with a population nearing 1,500,000, or 45% of the State's total population, have a total of four State Senators, yet the City of Baltimore enjoys six State Senators.

The existing disparities "are of sufficient magnitude" to rebut even the strongest presumption of constitutionality and to establish the unconstitutional dilution of voting rights which the Fourteenth Amendment forbids. *Lisco* v. *McNichols*, 208 F. Supp. 471, 478 (D. Colo., 1962).

C. Only Judicial Relief Can End or Mitigate the Discrimination. The injustice and the unconstitutional dilution of rights of suffrage, for relief of which appellants now have come to this Court, have long existed in Maryland. Over thirty-five years ago, the acidulous Baltimorean, H. L. Mencken, was provoked to complain that:

> "The yokels hang on because old apportionments give them unfair advantages. The vote of a malarious peasant on the lower Eastern shore counts as much as the votes of twelve Baltimoreans. But that can't last. It is not only unjust and undemocratic; it is absurd." [13]

While appellants lament Mencken's lack of charity, they also regret his conspicuous failure as a prophet in this instance. Unfortunately, with the exception of a mild reapportioning of the House of Delegates achieved at the May 1962 special session of the General Assembly, the unjustified political preference bestowed on a small minority of the voters of the Free State through a malapportioned legislature, and especially the Senate thereof, not only has endured but has increased since Mencken's bitter outburst of 35 years ago. True, the principal victims of what has been labeled "Barnyard Government" in Maryland may no longer be the voters of the City of Baltimore, but are now the partially disfranchised inhabitants of the large and heavily populated suburban counties. Still, no one can dispute that minority rule in the General Assembly of Maryland has not been shaken, much less toppled. In the Maryland Senate, the vote of one resident of the lower Eastern Shore now counts as much as the votes of thirty-two residents of Baltimore County! What Mencken thought could not last because of its absurdity continues to exist, to grow more absurd, and to an even greater extent, to deny the

[13] *Baltimore Evening Sun*, July 23, 1928, p. 15.

constitutional rights of those against whom the system discriminates.[14] In 1937, 18.1% of Maryland's population could elect a majority (15) of Maryland's 29 member State Senate. In 1963, 14% of the population are now so favored.[15]

It is not that citizens of the more populous political subdivisions of Maryland have not tried, desperately and persistently, to break the stranglehold on the State Government so long possessed by the representatives from the less populous areas. From 1951 through 1960, 11 proposals were introduced in the Maryland General Assembly, seeking merely the reapportionment of the House of Delegates. None of these were enacted; nor did any ever reach a vote on the merits (R. 28). This suit was filed in August, 1960. Subsequently, nearly a dozen reapportionment bills were introduced in the 1961 and 1962 regular sessions of the Maryland General Assembly, but none of these succeeded of passage.

Similarly, no legislation approving a Constitutional Convention which would have the power to propose apportionment amendments, has been enacted since 1867, although convention legislation was introduced in the 1951, 1954, 1955, 1957, 1960 and 1962 sessions of the General Assembly (R. 14). Moreover, representation in a Constitutional Convention would be on the same malapportioned basis as exists in the General Assembly.

The people of Maryland do not enjoy the right of initiative. They are also powerless to institute a proposed constitutional amendment. Under the Constitution of Maryland, a constitutional amendment can only be proposed by a

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[14] Lucas, *Barnyard Government in Maryland*, Reporter Magazine, April 12, 1962, p. 31.

[15] Dauer and Kelsey, *Unrepresentative States*, 44 *Nat. Munic. Rev.* 571, 575 (1955). If our population projections are accurate, by 1970 only 12% of the population will be required to elect a Senate majority. *Maryland Population Forecasts, 1965 and 1970, supra*, f.n. 1.

three-fifths vote of both the House of Delegates and the State Senate.

The futile efforts of the more populous areas to secure some reapportionment of representation in Maryland duplicate the experience of many other States. They confirm the perceptive observation, made a long time ago by a State court, that it "would be idle and futile to . . . [seek relief from malapportionment through] . . . the voluntary action of the body that made it." *State* v. *Cunningham*, 81 Wisc. 440, 483, 51 N.W. 724. The representatives from the less populous areas have too great an advantage to relinquish voluntarily their unnatural position of political preference in the absence of any binding court determination holding that it is unconstitutional for them not to do so.[16]

The long history of futile attempts to reapportion the Maryland General Assembly prior to the decision of this Court in *Baker* v. *Carr*, *supra*, quickly followed by the first decision in this case by the Court of Appeals for Maryland, 228 Md. 412, 180 A.2d 656, and the trial court's determination of May 28, 1962 voiding representation in the House of Delegates, is additional and, we believe, convincing evidence that, the nature of man, the politician, being what it is, legislative reapportioning *cannot* reasonably be expected in the absence of a controlling and authoritative judicial decision making it clear that existing representation violates constitutional rights but *can* be expected in the wake of such a decision.

In contrast to the issue resolved in the school segregation decisions announced by this Court in 1954 in *Brown* v. *Board of Education*, 347 U.S. 483, legislative malapportionment is not a subject that has deep and almost unbreakable roots in the culture of a large segment of the American

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[16] Short, *States That Have Not Met Their Constitutional Requirements*, 17 Law & Contemp. Probs. 377, 381 (1952); Schumacher, *Reapportionment in Oregon*, 3 W. Pol. Q., 428 (1950).

society. Primarily, if not exclusively, it is only the rural legislators, not their less self-interested constitutents, who can be expected to protest until the ultimate outcome. Unlike some of the difficult experiences which have accompanied lower court attempts to implement the school segregation decisions of this Court, there is absolutely no reason to expect, certainly not in Maryland, that an authoritative ruling of this Court, followed by implementing decrees of the Maryland Courts, will not be sufficient to induce the General Assembly of Maryland to perform its long neglected constitutional duty and to eliminate the invidious discrimination in rights of suffrage which is the direct consequence of the gross malapportionment which prevails in the Maryland State Senate in particular, as well as in the General Assembly as a whole.

D. *Adverse Consequences of Malapportionment.* Malapportionment represents more than mere mathematical unfairness or abstract injustice; it has important practical consequences as well. These have a far reaching impact on the nature of government in the States of the Union and with respect to the relationship of those States to the Federal Government and, indeed, even on the representation afforded in the House of Representatives of the Congress and thus, ultimately, on the national legislative process. In our opinion, the evil impact of gross malapportionment, as it has existed for so long and in so many States, represents a cancer on the body of democratic government, perhaps only equalled by the curse of segregation sanctioned by state law.

The denial or dilution of the right of suffrage because of race, creed or color, concededly is both undemocratic and reprehensible. Yet, until recent years it was, at least in one large area of the United States, both widespread and effective in achieving its purpose. However, in comparison to the extent and the effectiveness of the disfranchisement

of otherwise eligible voters which is achieved through the malapportioning of representation in State legislatures, the impairments of suffrage which were condemned in the voting right cases referred to earlier in this brief appear almost minor.

The scheme of malapportionment of legislative representation which appellants challenge exists in most of the States of the Union. The situation is especially familiar to the urban and suburban voters throughout the country who are caught in its seemingly unbreakable grip. Baker, State Constitutions: Reapportionment (1960), p. 1. The existence of this widespread and well known evil has been a subject of critical comment by many informed public officials who have encountered the problems it poses.[17] Continued and careful study on the part of the political scientists also has produced almost universal condemnation of the malapportionment of representation which exists in so many State governments and the adverse consequences of that blight on the principle of representative government. See, *e.g.*, Baker, Rural v. Urban Political Power (1955); Walter, *Reapportionment and Urban Representation*, 195 Annals 11, 12 (1938); De Grazia, *General Theory of Apportionment*, 17 Law & Contemp. Prob. 356 (1952). Equally vigorous in their criticism of malapportionment and the failure of state legislatures to do anything to remedy the situation, have been the legal commentators.[18] Representatives of the press, with increasing perceptiveness and inten-

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[17] Commission on Intergovernmental Relations, A Report to the President, 38-40 (1955); Douglas, *Unequal Voting: A Challenge to Democracy*, 1 Labor's Economic Review, 89, 99 (1958); *Collins, Cold War Casualties*, 47 Natl. Munic. Rev. 11, 13 (1958); Baker, Rural Versus Urban Political Power, 27-28 (1955).

[18] See, especially, the comprehensive and evocative law reveiew article by Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L.R. 1057 (1958); Tabor, *The Gerrymandering of State and Federal Legislative Districts*, 16 Md. L.R. 277 (1956); and for an exhaustive symposium on the whole subject, consult 17 Law & Contemp. Prob. 253-469 (1952).

sity, have been directing their journalistic fire at malapportionment and at the denial of representative government for which it stands.[19]

Several years ago, before his election as President, the then Senator Kennedy, in an article entitled "*The Shame of the States*," New York Times Magazine, May 18, 1958, p. 12, noted that:

> "[T]he apportionment of representation in our legislatures and to a lesser extent in Congress, has been either deliberately rigged or shamefully ignored so as to deny the cities and the voters that full and proportionate voice in government to which they are entitled."

This widespread alarm and dissatisfaction is justified. As one commentator observes, malapportionment "strikes at one of the mainsprings of our democratic government." Tabor, *The Gerrymandering of State and Federal Legislative Districts*, 16 Md. L.R. 277, 303 (1956). Nor can there be much doubt that the "continual disregard of the basic values professed by a society usually engenders among the public a sense of frustration, cynicism or apathy." Baker, *One Vote, One Value*, 47 Natl. Munic. Rev. 16 (1948). On principle, unreasonable discrimination in the representation allowed the political subdivisions of a state cannot be defended, unless one agrees with the poet, Homer, a defender of the aristocracy of ancient Greece, that it "is not good that the few should be governed by the many."[20]

Aside from the repudiation of the basic tenet of repre-

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[19] Strout, *The New Election Is Already Rigged*, Harpers Magazine, November 1959; *The Wall Street Journal*, October 17, 1960, p. 1.

[20] Davidoff, Treasury of Proverbs (Grossett & Dunlap: N. Y. 1946), p. 92. The decline of the Roman republic, perhaps, may be traced to the rejection in 124 B.C. by the Roman assembly of an electoral reform proposed by Caius Gracchus which would have bestowed full suffrage rights on all Latins, rather than restricting such rights to the 35 wards or "rotten boroughs", representing the original Latin tribes. Frank, A History of Rome (Holt: N.Y., 1923), p. 207.

sentative government which malapportionment represents, toleration of it inevitably produces adverse practical effects upon the operation of the governments of the States of the Union. It seems indisputable that malapportionment in legislative representation generally is grounded in a deeply rooted rural bias. Lewis, *Legislative Apportionment in the Federal Courts*, 71 Harv. L. R. 1057, 1064 (1958); Baker, State Constitutions, Reapportionment 4 (1960); Hurst, The Growth of American Law: The Law Makers 42 (1950). Moreover, it is almost impossible, in the nature of men, especially of politicians, to convince the legislative representatives from the rural areas to voluntarily surrender any portion of the preferential political power they may enjoy. Short, *States That Have Not Met Their Constitutional Requirements*, 17 Law & Contemp. Probs., 377, 381 (1952). As the last cited commentator has observed:

> "The advantage of political power now possessed by rural constituencies is not to be given up without a struggle. Such an advantage is particularly useful in the matter of determining tax rates and new sources of tax revenue, the formulae and amounts of State grants-in-aid, and the allocation of shared taxes. Individual legislators are apprehensive over the personal consequences of redistricting, including changes in district boundaries in large areas for campaigning, the possibility of having to run against each other, and the shifting of party strength."[21]

One of the major consequences of what has been called the "rural stranglehold" on State legislatures,[22] has been the neglect of the pressing problems of the heavily populated urban and suburban areas. The decay of large cities,

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[21] See also, Schumacher, *Reapportionment in Oregon*, 3 Western Pol. Q., 428 (1950).

[22] Lerner, America as a Civilization (Simon & Schuster: N.Y., 1957), p. 393.

the neglected expansions of suburban areas, financial and planning crises in education, housing, transportation, water, sewage, urban redevelopment, and civil rights problems, furnish the unpleasant hallmarks of almost every metropolitan area in the United States. Lewis, *supra*, p. 1058.

A former Mayor of Baltimore has experienced and complained of the adverse effects on his city caused by the indifference of a General Assembly dominated by representatives from the less populous areas. In pointing to the difficulty which the City of Baltimore has encountered in getting a satisfactory metropolitan transit authority approved by the General Assembly, former Mayor Grady stated:

> "Because the counties can marshal more voting strength in the legislature . . . their delegations can force more compromises of their special needs than can the city's representatives . . . if these problems are attacked one at a time . . . the city is liable to come out on the short end of all of them." [23]

As the rurally dominated legislatures continue to oppose, or more usually to ignore, the numerous economic and social problems with which their city and suburban colleagues wrestle, the inevitable consequence is that the responsible officials of the neglected metropolitan areas turn to the Federal government to invoke its aid in the solution of the difficulties with which they are beset. Harvey, *Reappor-*

[23] *Baltimore Morning Sun*, March 2, 1961, p. 30. To appellants' knowledge, Delaware is the only State, aside from Maryland, where the State constitution permanently freezes the representation afforded in *both* branches of the State legislature. Baker, *State Constitutions: Reapportionment*, 47 Nat'l Munic. Rev., pp. 63-70; see also, Baker, Rural Versus Urban Political Power, Table 1, p. 16 (1955). However, if the recent decision of a Delaware three judge court is upheld in this Court, the Delaware freeze will be ended. *Sincock* v. *Duffy*, 217 F. Supp. 169 (Del., 1963), appeal pending This Term, *sub. nom. Roman* v. *Sincock, etc.*, No. 307.

tionment of State Legislatures—Legal Requirements, 17 Law & Contemp. Probs., 364, 376 (1952); see also, Commission on Inter-Governmental Relations, A Report to the President (1955), p. 3. As former Governor Collins of Florida has said, "thwarted in their attempt to obtain the understanding and cooperation of rurally dominated state legislatures to help them in solving their problems, it is only natural that our citizens have turned to Congress for relief." Collins, *Cold War Casualties*, 47 Natl. Munic. Rev., 11, 13 (1958).

In Maryland, as in many other States, rural domination of the legislature has meant substantial discriminations in the form of tax and revenue preferences afforded the residents of the less populous areas, at the expense of those living in the more populous political subdivisions (R. 9). Much of the revenue collected by the State of Maryland from residents of the various political subdivisions is returned to the local areas pursuant to certain statutory provisions. These statutory provisions incorporate "equalization" formulae which control the manner and amount of the return of State funds to the local political subdivisions. These formulae, it need hardly be stated, were put into the statutes by the rural minority which so long has dominated the Maryland General Assembly, and which still controls its Senate. Their representatives resist to their effective utmost practically all changes in the equalization formulae which would have the effect of increasing the share afforded the more populous areas and reducing that given to the less populous political subdivisions (R. 9).

There is another major adverse practical effect of malapportionment in Maryland. Maryland's Constitution is almost 100 years old. Since 1867, 137 amendments to the Constitution have been proposed, of which 111 have been ratified by the people of Maryland. As a consequence, Mary-

land's ancient Constitution is cluttered with unnecessary, detailed and often prolix provisions better found in the statutes rather than in the fundamental charter of State Government. *Bethesda-Chevy Chase Tribune*, December 21, 1962, p. 4. Unarguably, the Maryland Constitution stands in need of extensive revision in order that it may be made more responsive to the needs of an important State in the middle 20th Century.[24] Indeed, the framers of the present Maryland constitution recognized the possibility that periodic general review of the Constitution would be desirable and necessary. The specific provisions of Article XIV, Section 2, and Article XVIII, Section 9, of the Constitution provide for the submission to the voters of the question of a constitutional convention every 20 years. Notwithstanding an overwhelming sentiment expressed in the 1950 election in favor of a constitutional convention[25], the General Assembly has consistently refused to enact the enabling legislation required. The reason has been no secret; a Constitutional Convention would have the power to alter the present provisions of the Maryland Constitution which perpetuate disproportionate representation, especially in the State Senate, and to submit new provisions for approval to the vote of the majority of the voters of the Free State. Tabor, *the Gerrymandering of State and Federal Legislative Districts*, 16 Md. L.R. 277, 283, *fn.* 29 (1956); *Baltimore Morning Sun*, Decem-

[24] *Washington Post & Times Herald*, December 13, 1962, p. B-7. For example, this Court has had its attention directed to an archaic constitutional provision under which Maryland juries are judges of the *law* as well as of the facts in criminal cases. *Giles* v. *Maryland*, 372 U.S. 767, appeal dismissed for want of a substantial federal question. See also *Bethesda-Chevy Chase Tribune*, March 8, 1963, p. 4, for editorial comment on the need for a Constitutional Convention to overhaul Maryland's ancient Constitution. The editorial is reprinted in the *Cong. Rec.*, March 21, 1963, p. A1581.

[25] The vote in favor of the proposal to hold a Constitutional Convention was 260,439 for and 56,998 against (R. 44).

ber 12, 1950, p. 16. As a result, the fear by the rural legislators, candidly confessed, that their present position of unnatural political preference and control might be jeopardized, has prevented badly needed and long overdue revision of a great number of other provisions of the State Constitution, to the detriment of all the citizens of Maryland.[26]

E. *A Helpful Precedent for Favorable Action In This Case.* Appellants accept the proposition that not every discrimination is invidious; nor "will it be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426, and cases cited. Moreover, this Court is justified in accepting "as established such reasons for the districting as are fairly conceivable or inferrable in and from the results." *Mann* v. *Davis*, 213 F. Supp. 577, 584 (E.D. Va., 1962), prob. jurisdiction noted 374 U.S. 803, and pending This Term *sub nom. Davis* v. *Mann*, No. 69. Nevertheless, where fundamental liberties are involved, there "are limits to the extent to which the presumption of constitutionality can be pressed." *Skinner* v. *Oklahoma*, 316 U.S. 535, 544; *United States* v. *Carolene Products Co.*, 304 U.S. 42, 152, *f.n.* 4. These limits have been passed in this case. The State, which did not contest any of the material allegations of the complaint, and could not really do so, has failed in meeting the burden put upon it of explaining, or at least conjuring up, a rational basis for the gross discrepancies of representa-

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[26] Even a modest proposal to establish a Constitutional Commission to study the need for a Constitutional Convention got nowhere at the last session of the Maryland General Assembly. *Washington Evening Star*, January 11, 1963, p. B-2. Maryland's inability to secure a Constitutional Convention brings to mind New Jersey's experience. That State finally obtained a Constitutional Convention only by accepting the demand of its Senate that the convention be precluded from changing the existing system of representation in the legislature. Graves, State Constitutional Revision (Pub. Ad. Serv., 1960), p. 72.

tion which now exist in the Maryland State Senate and, to a lesser degree, in the House of Delegates. It is only "history" to which they can point in their attempt to meet their burden, and for reasons which we discuss in a subsequent section of this brief, their limited effort in this direction also is unavailing.

Appellants say these things with somewhat greater confidence in the efficacy, now that this Court has spoken in a different but closely related context in its landmark decision of *Gray* v. *Sanders*, 372 U. S. 368. There, the Court struck down the ancient, archaic and undemocratic unit rule system of voting in primary elections in the State of Georgia. True, *Gray* v. *Sanders* involved the elections of state-wide officers and not of members of the Georgia legislature. Nevertheless, the principle enunciated there seems to us equally applicable here. If the "concept of political equality" is protected by the Fourteenth Amendment in counting the votes cast for executive officials, it is difficult to see why it is any less applicable in the protection it affords to votes cast for legislative representatives. As the majority opinion rhetorically inquired in *Sanders:*

> "How, then, can one person be given twice or ten times the voting power of another person in a State-wide election merely because he lives in the smallest rural county?"[27]

The answer that the Court gave in *Gray* v. *Sanders* was that the rural voter cannot be so favored. A close observer and reporter of the opinions of this Court has paraphrased the inquiry as follows:

> "Why should it be permissible to use the device of unequal legislative districts, any more than the unit

[27] 372 U.S. 368, 379.

rule system, to give one man ten times the vote of another?"[28]

We believe the answer is again the same; one man cannot constitutionally enjoy a vote worth ten times more than that of a fellow citizen similarly situated. In the Maryland State Senate, discriminatory weighting of representation reaches 32 to 1. As Chief Judge Brune said in his comprehensive dissent in the Court below:

> "A disparity of 32 to 1, we think, does exceed the permissible limit." (R. 179).

This gross disparity and many others almost as bad which now exist in the representation afforded in the Maryland State Senate, "seem much more than are required to assure a proper diffusion of political restraint, to paraphrase the diffusion of political initiative spoken of in *MacDougall* v. *Green*, 335 U.S. 281, at 284." (R. 183).

Is there anything in Maryland's history with which to rebut Chief Judge Brune's conclusion and turn aside the thrust of this appeal? We think not, and so show in the next portion of our brief.

II

A Federal Plan for Maryland: Non-Existent and Non-Analogous

Our adversaries, as well as the majority of the Court of Appeals for Maryland, rest their major defense of the gross disparities of representation which now exist in the State Senate on what they contend is a Federal plan of representation in the Maryland General Assembly analogous to that authorized under the Federal Constitution. We show below that Maryland has had no Federal plan, at least since 1864, and that even if such a plan had been adopted and adhered

[28] *New York Times* (Western Ed.), March 21, 1963, p. 6.

to as the structure of the State legislature, it would not preserve from condemnation under the Fourteenth Amendment the current unreasonable apportionment of representation prevailing in the Senate.

A. *Maryland Has No Federal Plan.* Since at least 1864, population has been taken into some account in the composition of the Maryland State Senate. In establishing this important historical fact, it might be helpful to trace briefly the constitutional history of the evolution of the General Assembly of Maryland. Throughout the colonial period, the upper house of the Maryland legislature consisted of the Governor and Council. The Council was appointed by the proprietor and was modeled after the English House of Lords. It sat as a provincial court and as a court of appeals from the county courts.[29] In the colonial period, the Maryland House of Delegates was selected on a county basis, with four members from each of the counties, of which there were then eighteen. The members of the Council were selected from among the most eminent landowners and office holders and served at the will of the Governor.[30]

The first Constitution of Maryland was adopted in 1776. Article XV thereof provided for a Senate to be selected by electors. Two electors were chosen for each county and one each from Annapolis and Baltimore Town, which was then a part of Baltimore county. Each county was entitled to four members in the House of Delegates. However, Annapolis, then a part of Anne Arundel County, was entitled to two delegates, and Baltimore Town was also given two.

At this time (1776), there were eight counties on the Eastern Shore and ten counties on the Western Shore of Maryland. The electors elected six senators from residents of

[29] Bond, Court of Appeals of Maryland (Amer. Hist. Ass'n: Norwood, Mass., 1933), p. 4; 1 MacMahon, Historical View of the Government of Maryland (1831), p. 148.

[30] Archives of Maryland (Md. Hist. Society: Baltimore, 1947), LXIV, p. xiii.

the Eastern Shore, and nine senators from residents of the Western Shore. The electors were directed to elect "men of the most eminent wisdom, experience and virtue, above 25 years of age, residents of the state above three whole years next preceding the election, and having therein real and personal property above the value of 1,000 pounds current money."[31] At the time the Western Shore contained the three most populous cities of the State, i.e., Baltimore Town, Annapolis and Frederick.

From this it would appear that even under the first Constitution of 1776, population was a factor not completely disregarded in the composition of the State Senate, despite the indirect election of its members and the requirement of substantial property qualifications as a prerequisite to election.

Nevertheless, it was true, as a leading historian of Maryland has documented, that under the 1776 Constitution the State Senate was "deliberately designed to constitute an aristocratic stronghold to check any hasty or ill advised action on the part of the House." Radoff, The Old Line State (Historical Record Assoc., 1956), p. 43. For example, the members elected to the electoral college were required to possess property above the value of 500 pounds. They were elected every five years. As Professor Radoff reports:

> "With these precautions taken, it is not surprising that the government of Maryland remained conservative throughout and after the American Revolution. The Senate became, as it was designed to be, a sort of aristocratic clique made up of a few men of great wealth [Senators had to possess property in excess of 1,000 pounds] who served to check and frustrate any democratic schemes that might emerge from the populace at large."[32]

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[31] Niles, Maryland Constitutional Law (Hepbron & Haydon: Baltimore, 1915), p. 4.

[32] Radoff, *supra*, at p. 44.

Maryland's early experience with a Senate elected on a basis of suffrage completely different from that of the lower House proved not to be a very salutary one. Within a few years "the disparity between the two Houses, both in terms of manner of election and of appropriate qualifications [produced] . . . serious discord."[33] Finally, after a titanic constitutional and political struggle, with the State on the brink of armed conflict, in 1837 the indirect election of Senators was abolished and the Senate made a popularly elective body by direct vote of the people, with one Senator from each county, and one from Baltimore. Radoff, *supra*, at p. 64.

Maryland's unhappy experience with two Houses elected on different or distinct bases of suffrage, disproves James Madison's assumption of 1789 and contradicts the lower court's present view, that a Senate in which population is disregarded may still be a worthwhile institution of State government. Writing in No. 63 of the Federalist Papers, Madison attempted to allay the widespread and justified fear that an indirectly elected Senate would become unresponsive to the people and aristocratic in nature. He argued:

> "If reason condemns the suspicion, the same sentence is pronounced by experience. The constitution of Maryland furnishes the most apposite example. The Senate of that State is elected, as the Federal senate will be, indirectly by the people and for a term less by one year only than the Federal Senate. It is distinguished, also, by the remarkable prerogative of filling up its own vacancies within the term of its appointment and, at the same time, is not under the control of any such rotation as is provided for the Federal Senate. There are some other lesser distinctions which would

[33] *Ibid.*

expose the former to colourable objections that do not lie against the latter. If the Federal Senate, therefore, really contained the danger which has been so loudly proclaimed, some symptoms at least of a like danger ought by this time to have been betrayed by the Senate of Maryland, but no such symptoms have appeared. On the contrary, the jealousies at first entertained by men of the same description with those who view with terror the correspondent part of the Federal constitution, have been gradually extinguished by the progress of the experiment; and the Maryland Constitution is daily deriving, from the salutary operation of this part of it, a reputation in which it will probably not be rivalled by that of any State in the Union."[34]

Despite Madison's clear but limited purpose in making the argument quoted above, the Court below concluded from those remarks that the Maryland Senate furnished the model for the United States Senate (R. 166). This is true only with respect *to the manner of indirect election* followed in each. Maryland's toleration of an indirectly elected Senate was short lived and, as previously stated, was abandoned in 1837. Bell, The Legislative Process in Maryland (Univ. of Md., 1958), p. 11.

During the early nineteenth century, several attempts were made to change the basis of representation in the General Assembly. One of the first of these was an effort made in 1805, when delegates from Baltimore City introduced a bill to add one more person to the Baltimore delegation in the House of Delegates. By that time, Baltimore had grown rapidly and already had a population larger than any of the counties, each of whom had four delegates. The bill was defeated.[35] Soon thereafter, the rapidly growing

[34] American State Papers, 43 Great Books Ed. 194.
[35] Radoff, *supra*, p. 56.

counties of Western Maryland, which embraced the cities of Frederick and Hagerstown, as well as a number of small mill and market towns, joined Baltimore in the ranks of underrepresented areas. It was in these areas that Thomas Jefferson's party enjoyed its heaviest following. However, because of the discrepancies of representation, the Federalist party was able to control the political affairs of Maryland, even though the majority of the people leaned to the Democratic-Republican party of Jefferson. For example, in 1812, according to the calculations of one Baltimore editor, the Jeffersonian party had achieved a majority of more than 2,000 votes among those cast in the elections for the General Assembly, yet the Federalists were able to obtain a majority of over two to one in each House.[36]

Between 1819 and 1828, the Federalists and their successors, the Whigs, were able to defeat several reapportionment bills introduced in the General Assembly. In successfully resisting these measures, the Federalists and Whigs expressed continued alarm over the burgeoning population of Baltimore, one third of it being foreign born and suspected "Jacobins."[37] In 1836, a bipartisan reform convention convened at Baltimore in an attempt to launch a campaign for the election of legislators of both parties pledged to reapportionment. The effort bogged down in the partisan politics generated by the election of 1836 and accomplished nothing.[38]

The next major endeavor to change the representation of the Maryland General Assembly occurred in the Constitutional Convention of 1851. In that convention, the representatives of Baltimore City and several Western counties attempted to secure representation of the House of Dele-

[36] Niles, Weekly Register (Baltimore), October 16, 1813, p. 111.

[37] Radoff, *supra*, p. 58; Steiner, Citizenship and Suffrage in Maryland, (Baltimore: Cushing and Co., 1895), p. 32.

[38] Radoff, *supra*, p. 63.

gates on the basis of population, but were defeated by a vote of 17 to 60. Failing in that, they proposed that Baltimore be given the same representation as the largest county. Again, their motion was defeated 33 to 42, the representatives of smaller counties making it clear that they were not willing to see either the City of Baltimore or the larger counties represented on the basis of population.[39]

We move next in point of history to the Constitutional Convention of 1864, which was held as a result of problems arising during the Civil War. Prior to this Convention, convened while Maryland was under the yoke of the Union Army, the strength of the smaller and generally Southern oriented counties had been weakened substantially by voting "test oaths" and through the imprisonment of some of their representatives. The Constitution approved by the 1864 Convention divided Baltimore City into three legislative districts. Baltimore City also received one Senator for each of its three legislative districts.[40]

The limited available legislative history of the 1864 Convention shows that the increasing demands for larger representation for Baltimore City, which first came to a head in the Constitutional Convention of 1851, were at least to be partially recognized.[41] The population of Baltimore in 1864 was just under 250,000. By 1870 its population had grown to 267,354, or 34% of the State's total of 780,894.[42]

The Constitutional Convention of 1867 confirmed the additional representation approved with respect to Baltimore City by the 1864 Convention. The three legislative districts of Baltimore City were continued, and each of the

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[39] Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution (Annapolis: William M'Neir, 1851), p. 118.

[40] Debates of the Constitutional Convention of the State of Maryland Assembly at the City of Annapolis, Wednesday, April 27, 1864 (Annapolis: R. P. Bayly, 1864).

[41] Bell, *supra*, at p. 14.

[42] *Id*, at p. 15.

legislative districts was given as many Delegates as the largest county.[43] By 1900, the City of Baltimore had grown to 508,957, and its proportion of the State's population had increased to 43%. In 1900, after the passage of a constitutional amendment, Baltimore was given an additional legislative district and one more Senator.[44] The available legislative history of the constitutional amendment of 1900 shows that it was proposed and approved only because Baltimore's expanding population moved the General Assembly and the people to permit the City to be given an additional legislative district and one more State Senator.[45]

By 1920 the population of Baltimore had risen to 733,826. This represented 51% of the State's total.[46] In the 1920's an extensive campaign was waged to secure additional representation for Baltimore.[47] The justification asserted for

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[43] Debates of the Maryland Constitutional Convention of 1867, compiled by Philip B. Perlman (Baltimore: Hepbron & Hayden, 1923), pp. 297-300.

[44] Bell, *supra*, p. 15.

[45] See, *e.g.*, *Baltimore Sun*, February 14, 1900, p. 8, and especially the following editorial of the *Baltimore Sun*, February 16, 1900, p. 4, col. 1:

". . . Baltimore is entitled, upon every equitable consideration, to an increased representation in the legislature . . . Its present representation, as established by the Constitution of 1867, does not rest upon any basis of principle whatever, having reference to either wealth or population further than that to the city is conceded a larger representation in House and Senate than is awarded to any county. Each of the 23 counties . . . without reference to size, taxable basis or population is awarded one Senator. Baltimore City, being divided by the Constitution into three legislative districts, each district is declared to be entitled to be similarly represented, giving to the city, therefore, three Senators out of 26. *There is no principle involved in this. The legislative districts of Baltimore City are not counties, and have none of the attributes of counties* . . . the palpable injustice of the present arrangement is self-evident. Based upon no principle, it can appeal to no principle for justification. *It violates, in fact, every principle underlying our system of republican representative government* . . ." (Emphasis supplied).

[46] Bell, *supra*, p. 15.

[47] See, *e.g.*, *Baltimore Morning Sun*, March 16, 1920; *Baltimore Morning Sun*, March 10, 1921.

such further representation in the legislature, as stated by Governor Ritchie, was the "growth of population in Baltimore" which, he argued, "entitles the City to increased representation in both houses of the General Assembly." [48] The campaign was successful. In 1922 the City of Baltimore was granted two additional districts, including two more State Senators, bringing its total to the six legislative districts and State Senators which the City now has.

In 1922, Baltimore, with 51% of the State's population, enjoyed approximately 21% of the representation provided for in the State Senate, and 31% of the representation provided for in the House of Delegates. Today, the four suburban counties, with 45% of the State's population, have less than 14% of the representation in the State Senate, and approximately 28% of that in the temporarily reapportioned House of Delegates.

Too plainly for argument, the population principle has been applied in the Maryland State Senate since 1864, at least so far as the City of Baltimore is concerned. Nevertheless, the courts below both attempted to dodge the compelling force of this historical precedent by describing Baltimore's situation as "unique" (R. 120) or justified by "special reasons" (R. 166). Actually, it was because of Baltimore's "unique" position as the only urban area of Maryland that it did not get the full representation to which it was fairly entitled by virtue of its population. However, the fact remains that the City at least was given some additional representation because of its expanding population, originally in the Convention of 1864, again in 1900, and once more in 1922. In each instance, the additional representation provided included an increase in Senate seats.

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[48] *Baltimore Morning Sun*, March 16, 1920.

Appellants ask that the present more populous subdivisions be afforded the same treatment which was extended Baltimore in the past. Indisputably, the population principle has been taken into some account as a factor in determining the composition of the Maryland State Senate. Having been applied, it must be invoked on a rational basis. Justification of its application with respect to Baltimore on three separate occasions rested on the increased population of that City. The very same reason supports appellants' argument that not to extend the population factor or principle to other more populous subdivisions of this State is to discriminate arbitrarily without any basis in reason, or, for that matter, in the words of the trial court, any basis in "history or tradition." In seeking simple equity and the elimination of invidious geographical and populative discrimination with regard to the Maryland State Senate, appellants are not, as the Attorney General, with a rhetorical flourish, has thundered, attempting "to change the form of Government of this State." Our argument is simple, historically documented and, we believe, unanswerable. Population was taken into account in the composition of the Maryland State Senate as early as 1864; it should be taken into account in 1963.

In one other important and distinctive respect, it is also established that the Federal plan or system of representation has not been adhered to in Maryland. Under the Federal Constitution, representation in the House of Representatives is based exclusively on population, except that each State is entitled to at least one Congressman. At present, there are 436 members of the House of Representatives, representing the Congressional districts of the 50 States of the Union. Only Alaska, Delaware, Wyoming, Nevada and Vermont fail to meet the minimum population prerequisites, and therefore elect only one Congressman at large. Apart

from the five States enumerated, representation in the other 45 States is in strict accordance with population.[49]

In the Maryland House of Delegates, on the other hand, representation has never been based on anything even approximating such a close ratio of population to area. For example, as previously noted, Baltimore's 1870 population was 34% of the State's total, yet the City was afforded only 21% of the representation provided in the House of Delegates. Similarly in 1920, with 51% of the State's population, Baltimore was given only 31% of the representation in the lower House.[50] At the present time, even allowing for the "stop-gap" reapportionment of the House of Delegates, the four suburban counties with 45% of the State's population, are given roughly 28% of the representation in the present 142 member House of Delegates. If there was a true Federal plan or system in effect in Maryland, the suburban counties and the City of Baltimore combined would be entitled to a minimum of 105 Delegates out of the 142 for which provision is now made. They have, however, only 79. At present, 76% of Maryland's population does not enjoy sufficient representation (86 members) to approve an amendment to the State Constitution, even in the House of Delegates. On these facts, and independently of the failure to follow the Federal scheme in the State Senate, the appellees should not be heard to argue that Maryland has adopted anything like the Federal plan of representation.

The historical facts attest to Chief Judge Brune's accuracy in stating that "strictly as a matter of history, the

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[49] Out of 436 Congressional seats, only 5, or approximately 1%, fail to meet the minimum average population requirement. In Maryland, 19 seats in the House of Delegates, or 14% of the total, come from counties having less than 26,000 in population, the minimum average. This does not take into account the substantial additional representation afforded the less populous counties without regard to population, a concession which is not made to the less populated States in the House of Representatives.

[50] Bell, *supra*, p. 5.

pattern of one senator per county or comparable political subdivision was in force [in Maryland] only from 1851 to 1864" (R. 177). They also demonstrate that population *never* has been the exclusive basis of representation in the House of Delegates. Neither history nor tradition, therefore, can be successfully relied on to argue that Maryland has adopted and adhered to a comparable system of representation as established by Article I of the Constitution of the United States.

B. *Even As A Hypothetical Analogy, The Federal Plan Fails.* The Court of Appeals of Maryland appears wedded to the notion that since the Federal system of representation appears to have worked reasonably well in the history of our national government, a federal republic, it is not unreasonable to permit the states, including Maryland, to adopt it as a basis of representation. Maryland has not observed the Federal plan. However, as we show in the next section of this brief, even if Maryland had adopted and followed a Federal plan, it would not suffice to protect the present gross disparities of representation in the Maryland State Senate from condemnation as invidious discrimination.

Extended analysis is not required to dispel the contention that a Federal plan for Maryland, or for other States of the Union, would satisfy the Fourteenth Amendment. In the first place, it seems that such a contention is more a desperate afterthought than a compelling argument. Until this Court made clear in *Baker v. Carr*, *supra*, that claims of gross disparity in the representation afforded different political subdivisions in a State legislature might constitute a violation of the Fourteenth Amendment for which judicial relief was available, the view that a two house State legislature was analogous to or patterned on the

Federal plan, if conceived, was rarely voiced.[51] Appellants find no early commentators on the structure of State government in America, writing during the period when many state constitutions were being enacted or revised, who found analogy between the two House state legislature and the Federal system.[52] As Judge Bryan of Virginia recently pointed out:

> "The bicameral system is a creature of history, and many of the reasons for its creation no longer obtain. The chief justification for bicameralism in state government now seems to be the thought that it ensures against precipitate action—imposing greater deliberation—upon proposed legislation."[53]

Actually, only eight legislative bodies are apportioned strictly according to political units of the State. These are the Senates of Arizona, Idaho, Montana, Nevada, New Jersey, New Mexico and South Carolina, apportioned by counties, and the House in Vermont, apportioned by towns.[54] Maryland is excluded from the list cited, since the six legislative districts of the City of Baltimore (all of which have one Senator each) do not constitute political units of the State. Conversely, the original constitutions of 27 States contained provisions apportioning all legislative seats according to population, and an additional

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[51] Hanson, *Courts in the Thicket: The Problem of Judicial Standards in Apportionment Cases*, 12 Amer. Univ. L.R. 51, 73 (1963); McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 Mich. L.R. 645, 689 (1963).

[52] See, *e.g.*, Bryce, I The American Commonwealth, 484 (1917 Ed.); Tocqueville, Democracy in America (Vintage, 1955), p. 87.

[53] *Mann v. Davis*, 213 F. Supp. 577, 585 (E.D. Va., 1962), prob. juris. noted, 374 U.S. 803; see also, Luce, Legislative Assemblies (Houghton-Mifflin, 1924), pp. 47, 58, 85.

[54] *Apportionment of State Legislatures*, Report of the Advisory Committee on Intergovernmental Relations, December, 1962, p. 14, *f.n.* 55.

nine constitutions provided for a slight modification of population in one House of the legislature.[55]

Appellants will not dwell at any length on the historical and quite distinguishable basis of the Federal plan, which is extensively discussed in Professor McKay's authoritative treatment of the inapplicability of the Federal analogy to state legislative bodies. McKay, Reapportionment and the Federal Analogy (Natl. Munic. League, 1962), pp. 4-7. The Federal plan written into Article I of the Federal Constitution, as all students of American history are aware, represented an extremely reluctant compromise which the smaller States wrenched from the larger States. The former threatened "to bolt the convention" unless they won equal representation for the States in the Senate. The compromise arrived at was required "to break the convention's worst impasse." Morgan, Birth of the Republic (Univ. of Chicago, 1956), p. 141.[56] As a result, Madison says, the Senate represents "a constitutional recognition . . . of [the] sovereignty remaining in the individual States," while the people have a "proportional sh. in the government" of the United States through the representation provided in the House.[57]

The historical reasons which support the compromise which resulted in Article I of the Federal Constitution do

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[55] *Ibid*, page 35. Nebraska and the Territory of the Virgin Islands have unicameral legislatures.

[56] Farrand, The Framing of the Constitution of the United States, 105 (1913). Madison, writing in Number 62 of the Federalist Papers, confessed the Hobson's choice which the larger States were required to accept if a true Federal Union was to be formed: "A government founded on principle, more consonant to the wishes of the larger states is not likely to be obtained from the smaller states. The only option, then, for the former lies between the proposed government and a government still more objectionable. Under this alternative, the advice of prudence must be to embrace the lesser evil; and instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences which may qualify the sacrifice." American State Papers, 43 Great Books Ed. 189.

[57] American State Papers, *supra*, p. 189.

not carry over to provide a rational basis for the grossly disproportionate representation which exists in the Maryland State Senate. Maryland is not a federated republic: it is a unitary State; it is not the "United Counties and Legislative Districts of Maryland." Its counties, and even more its legislative districts, are neither sovereign nor quasi-sovereign bodies. 6 Md. Law Encl. 497. As Chief Judge Brune noted in his dissent, and the majority below did not dispute the point, the counties and the legislative districts of Baltimore City "remain creatures of the State, and they have no . . . constitutional guarantee" of either continued existence or the exercise in the future of such powers which the State has given them in the past (R. 177).

For example, under Article XIII of the Maryland Constitution, two new counties have been created since 1867. The cases which establish the dependence of the counties on the General Assembly of Maryland are many; appellants cite only representative decisions: *Clauss* v. *Board of Education of Anne Arundel Co.*, 181 Md. 513, 30 A. 2d 779; *Howard Co. Commissioners* v. *Matthews*, 146 Md. 553, 127 A. 118. In this respect, Maryland merely illustrates the universal rule concerning the limited authority possessed by the political subdivisions of a state and their dependence on the state legislature for both their existence and their exercise of governmental powers. *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178.

The attempted analogy of the Federal plan fails in a second and even more fundamental point of fact. The Fourteenth Amendment did not become part of our basic charter of national government until 78 years after the Constitution of the United States was ratified by the States in 1790. That amendment which, almost since its passage, has been interpreted in so many areas to have effected basic changes in the form of the government of the States, and

the powers permitted them, far from complementing or inferentially approving a Federal plan for representation for each State of the Union, points in the opposite direction. Article I, having been expressly written into the Constitution, cannot, of course, be attacked as unconstitutional, so far as the Federal Government is concerned. The Fourteenth Amendment, however, permits, and indeed sustains, a challenge to a Federal plan of representation, so far as the States are concerned, where its application would sanction, as it would in Maryland, "invidious discrimination." As Judge Black, of the Michigan Supreme Court, correctly observed in his concurring opinion in *Scholle* v. *Hare*, 360 Michigan 1, 123, 104 N.W. 2d 63, reversed and remanded, 369 U.S. 429:

> "Article I . . . [of the Federal Constitution] *guarantees inequality* of the representative value of a man's vote so far as concerns a National Senate, whereas the Fourteenth Amendment guarantees a substantial approximation of the *very opposite* within the framework of the Government of each State." (Emphasis supplied).

The issue of the so-called Federal analogy has been raised in other cases besides this. Federal courts in Virginia [58] and in Delaware,[59] have rejected the alleged analogy as a rational basis for apportionment in State legislative bodies. On the other hand, the Court below, a Federal court

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[58] *Mann* v. *Davis*, 213 F. Supp. 577 (E.D. Va., 1963), prob. juris. noted, 374 U.S. 803.

[59] *Sincock* v. *Duffy*, 215 F. Supp. 169 (Del., 1963), appeal pending This Term, *sub. nom. Roman* v. *Sincock*, No. 307. The Federal analogy also was rejected in the recent ruling of a three judge Federal court for Western Oklahoma requiring a reapportionment of both houses of the Oklahoma legislature on a population basis, *Moss* v. *Burkhart*, — F. Supp. — (W.D. Okla., 1963); *Washington Post & Times Herald*, July 18, 1963, p. A-2.

in Ohio,[60] and a lower state court in New Jersey, seem to have accepted it.[61] This Court has not passed upon the precise question. However, we hopefully read its decision in *Gray* v. *Sanders*, 372 U. S. 369, 378, to suggest that the analogy is "inapposite."

Appellants do not dispute that in a theoretical case, where the populations of the various political subdivisions of a State were approximately equal, allowing equal representation on the basis of political subdivisions in one house of a state legislature, might satisfy the requirements of the Fourteenth Amendment. However, nothing remotely like that situation exists in Maryland. Therefore, even if Maryland had adopted and adhered to a Federal plan, that would not avoid the fact that the substantial disparities of representation which now exist in the Maryland Senate violate Section 1 of the Fourteenth Amendment. It cannot be the law that gross malapportionment in either one or both houses of a state legislature is immune from the requirements of the Fourteenth Amendment by virtue of the fact that the legislative structure of a State government can be rationalized as being superficially analagous to the structure of the United States Congress. If it is, then, clearly, all efforts to obtain reasonably fair representation in the legislative chambers of Maryland and of most other States are doomed to failure.

III

Invidious Discrimination Exists With Respect to the General Assembly as a Whole

From the beginning, plaintiffs have challenged the total representation afforded in the General Assembly of Mary-

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[60] *Nolan* v. *Rhodes*, — F. Supp. — (S.D. Ohio, 1963), unofficially reported, 31 U.S. Law Wk. 2641, June 25, 1963.

[61] *Jackman* v. *Bodine* (N.J. Super. Ct.), 188 A. 2d 642, 652.

land, as well as that provided in the State Senate considered as a separate house (R. 19). The Chancellor and the Court of Appeals for Maryland apparently have elected to measure the Senate and the House of Delegates by different standards in determining whether the representation provided in each satisfies the Fourteenth Amendment. We fail to understand how a challenge under the Fourteenth Amendment against one house of a bicameral legislature can stand on any different footing than when such an attack is made on the other, or on the legislature as a whole.

The fundamental issue in this case is the value of the rights of suffrage possessed by citizens of Maryland. Ultimately this refers to the ability to pass legislation preferred by a majority. In a bicameral legislature, such as the Maryland General Assembly, the enactment of legislation requires not a majority of all the legislators in both Houses, but a successive majority of the legislators in each House. Accordingly, the appellants and other voters of Maryland similarly situated are not freed from the unconstitutional disadvantage imposed on them by gross malapportionment merely because they now have a bare majority of the House of Delegates. The unreasonable dilution of their vote in *either* the House of Delegates *or* the Senate effectively frustrates the legislative process and lays the groundwork for legislative deadlock. A majority should have the right to *pass*, not merely to block, legislation. *Cf. Sincock* v. *Duffy*, 215 F. Supp. 169, 171 (Del., 1963), appeal pending This Term, *sub nom. Roman* v. *Sincock*, No. 307.

Maryland experienced governmental frustration of a similar kind many years ago, until it was eliminated by the constitutional changes occurring in 1837, under which the members of the Maryland State Senate were popularly elected like their counterparts in the House of Delegates. Again, 125 years later, Maryland is able to provide a political scientist's case study of the consequences of the stale-

mated government which can arise when one house of a state legislature is related, at least, to population, but where (with one exception) it is not taken into account in a second and upper house. Appellants refer to the 1963 session of the Maryland General Assembly, the first session of that body following the temporary reapportioning of the House of Delegates enacted at the special session in May, 1962. Representative examples follow of what can be expected where bare majority rule exists in one house and extreme minority rule dominates in the other:

A compelling example was the Maryland General Assembly's refusal to abolish the archaic and inequitable unit rule system of selecting nominees for state-wide offices in primary elections, which had prevailed for over 50 years in Maryland until a decision of the United States District Court for the District of Maryland, entered on May 10, 1963 in *The Maryland Committee for Fair Representation et al. v. J. Millard Tawes, et al.*, C. A. No. 14452, struck it down as unconstitutional. *Baltimore Morning Sun*, May 11, 1963, p. 30. Early in the 1963 session, the recently reapportioned House of Delegates had voted to abolish the unit rule system by a vote of 122 to 9. *Baltimore Morning Sun*, January 23, 1963, p. 38. This proposal, however, was defeated in the grossly malapportioned Maryland Senate by a vote of 16 to 13. Of the majority, 15 were Senators representing the less populous counties. *Baltimore Morning Sun*, February 14, 1963, p. 46. After this Court's epochal decision in *Gray v. Sanders*, 372 U.S. 368, the House of Delegates again passed a bill to abolish the unit rule. This time the vote for passage was 121 to 3. *Washington Evening Star*, March 27, 1963, p. C-3; *Washington Post & Times Herald*, March 27, 1963, p. D-1. The controlling majority of the State Senate, however, remained adamant in its opposition, and deliberately permitted this second attempt to abolish the unit rule system to die in the closing hours of the 1963 leg-

islative session. *Baltimore Morning Sun*, April 2, 1963, p. 25; *Washington Evening Star*, April 2, 1963, p. B-2.

Another instance of the State Senate's refusal to pay even lip service to the principle of majority rule is legislation which passed the rurally dominated Senate at the last session of the Maryland General Assembly, under which the House of Delegates would have been permanently reapportioned on a basis which, in a very few years, would result in the House of Delegates being even more malapportioned than it is at present. The bill, naturally, would have left the Senate intact. *Baltimore Morning Sun*, February 5, 1963, p. 36. Fortunately, this preposterous legislation was rejected by the Judiciary Committee of the House of Delegates. *Baltimore Morning Sun*, March 26, 1963, p. 38; *Washington Evening Star*, March 26, 1963, p. B-1.

Nor did the State Senate, despite a pertinent decision of a Baltimore City Court, accept the idea that the six legislative districts of Baltimore should be reasonably equal in population as expressly required by Article III, Sec. 2, of the Maryland Constitution. Although the House of Delegates passed legislation to implement the Court's order and to meet the standards of the State Constitution, it was defeated in the Senate. *Baltimore Morning Sun*, April 2, 1963, p. 38.

Another example of the Senate's refusal to approve legislation passed by the more representative House of Delegates and apparently in the interests of the majority of the people of Maryland, is provided in its rejection of increased financial aid to the burgeoning State school system, which had passed the House by a vote of 94 to 34. *Washington Post & Times Herald*, April 2, 1963, p. B-1; *Baltimore Morning Sun*, April 2, 1963, p. 58. The bill died in the State Senate on the last day of the 1963 session of the General Assembly. *Washington Evening Star*, April

2, 1963, p. A-1. Similarly, the Senate buried a small loan bill which had passed the House of Delegates by a comfortable margin, and which would have made it easier for persons of modest means, and without established bank credit, to borrow money. *Baltimore Morning Sun*, April 2, 1963, p. 25. And in the field of conservation, proposals for the public development of Assateague Island on the Atlantic Ocean, the last large undeveloped stretch of ocean coast on the Atlantic, which twice had been approved by the House of Delegates, were bottled up and left to die in the Maryland State Senate. *Washington Post & Times-Herald*, April 5, 1963, p. C-1.

Conversely, however, recently proposed amendments to the Federal Constitution under which the jurisdiction of this Court would be radically curtailed and as a result of which the Congress could be by-passed in the amending process, received a favorable reception in the Maryland State Senate at the last session of the General Assembly. We refer here to the three proposals for amending the Constitution, all originating with the Council of State Governments.[62] One would establish a Court of the Union, composed of the State Chief Justices, with authority to review certain judgments of this Court. The second would remove jurisdiction of Federal courts over malapportionment and gerrymandering. The third would permit the Federal Constitution to be amended whenever two thirds of the State legislatures passed resolutions proposing an amendment and after three fourths of the States thereafter approved the amendment proposed.

These three proposals, all drastic, indeed revolutionary, in nature and which, if enacted, would convert our constitutional system from a Federalist Union to a Con-

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[62] *Amending the Constitution to Strengthen the States in the Federal System*, 36 State Government 10 (1963).

federation of States,[63] have been denounced by the United States Conference of Mayors, representing the urban areas where nearly 70% of the country's population resides.[64] They also have been condemned by the American Bar Association.[65] At least two members of this Court also have called for the most careful consideration and the widest possible national debate concerning the wisdom of adopting these three startling suggestions for changing our national government.[66]

Despite this, the Maryland State Senate very promptly considered and passed, by a vote of 16 to 6, the proposal to eliminate Congressional participation in the Constitutional amending process. 15 Senators, constituting a majority of the State Senate, and representing the less populous counties, voted in favor of the adoption of this radical Constitutional proposal. *Washington Evening Star*, March 26, 1963, p. B-14. Fortunately, the House of Delegates, more popularly representative of the people of Maryland, narrowly defeated the bill when it came to the floor, and the other two proposed Constitutional amendments were killed in the Judiciary Committee of the House of Delegates. *Baltimore Morning Sun*, January 28, 1963, p. 22.

The legislation discussed above constituted the bulk of the important measures considered at the 1963 session of the Maryland General Assembly.[67] Their history demonstrates the absurdity of a legislature in which the primary

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[63] See the critical discussion in Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 Yale L.J. 958 (1963).

[64] *New York Times*, June 12, 1963, p. L-29.

[65] *New York Times*, May 22, 1963, p. 1; *Washington Evening Star*, May 22, 1963, p. A-2; *New York Times*, August 13, 1963, p. 19.

[66] *Washington Post & Times Herald*, May 26, 1963, p. E-4.

[67] The other significant items were stretched out anti-slot machine legislation, inequitable Congressional redistricting, and an "equal accommodations" law, applicable to only half of the political subdivisions of Maryland.

basis of representation in one house is population, and where the exclusive basis of representation in the other is area. We do not wish to be misunderstood; appellants do not argue for unicameralism. They agree, with many others, that the bicameral legislature has proved itself as a worthwhile mechanism of state government. Two houses tend to slow down legislation, to insure full hearings on important matters, and to temper legislative judgment by providing a second look from a different point of view. For these reasons, appellants accept the idea of a smaller State Senate, the members of which represent a broader base and more divergent constituency than those who serve in the House of Delegates. Quite properly, Senate constituencies should include larger and different population groups, as well as more diverse economic interests. One of the most knowledgeable of all the authoritative students of American government, however, has summed up the basic reasons in favor of a bicameral state legislature, and at the same time distinguished these from the quite different historical reason which explains the bicameral Congress:

> "*Reasons for Two Houses in State Legislatures. There is, consequently, no such historical reason for having two houses in the states as exists in the case of the federal government.* The object of the federal arrangement is the representation of the two elements upon which the national government rests, namely, the popular will and a federal union of states. *The state legislatures have two houses simply for purposes of deliberateness in legislation*, in order, that is, that legislation may be filtered through the debates of two coordinate bodies, representing slightly differing constituencies, though coming both directly from the people, and may thus escape the taint of precipitation too

apt to attach to the conclusions of a single all-powerful chamber. *The double organization reprgsents no principle, but only an effort at prudence.*''[68] (Emphasis supplied).

In all this, therefore, appellants plainly adhere to bicameralism, not unicameralism. However, for a bicameral legislature to operate as an effective instrument of state government, it cannot rest, as the Maryland General Assembly now does, on a structure of sharply divided and completely divergent representation, wherein one house represents people and the other represents only "geography," areas, units of local government, "history," or the once more equally populated political subdivisions of days long past.[69] Maryland has had the misfortune in its history of twice demonstrating the efficacy of that observation. One experiment ended (almost in insurrection) in 1837;

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[68] Woodrow Wilson, The State (Boston: D. C. Heath, 1898), para. 1134, pp. 487-489.

[69] As John Locke, in his treatise *Concerning Civil Government*, 35 Great Books Ed. 61, said a long time ago of the English rotten borough system:

"Things of this world are in so constant a flux that nothing remains long in the same state. Thus people, riches, trade, power, change their stations; flourishing mighty cities come to ruin, and prove in time neglected desolate corners whilst other unfrequented places grow into populous countries filled with wealth and inhabitants. But things not always changing equally, and private interest often keeping up customs and privileges when the reasons of them are ceased, it often comes to pass that in governments where part of the legislative consists of representatives chosen by the people, that in tract of time *this representation becomes very unequal and disproportionate to the reasons it was at first established upon. To what gross absurdities the following of custom when reason has left it may lead, we may be satisfied when we see the bare name of a town, of which there remains not so much as the ruins, where scarce so much housing as a sheepcote, or more inhabitants than a shepherd is to be found, send as many representatives to the grand assembly of law-makers as a whole county numerous in people and powerful in riches.* This strangers stand amazed at, and every one must confess needs a remedy; though most think it hard to find one, because the constitution of the legislative being the original and supreme act of the society, antecedent to all positive laws in it, and depending wholly on the people, no inferior power can alter it,

the other began in 1962, following the stop-gap reapportionment of the Maryland House of Delegates, and will persist unless this Court reverses the decision below.

Looked at as a whole, therefore, and even assuming *arguendo* that population can be disregarded completely so far as representation in the Senate is concerned, it follows that appellants' rights of suffrage in the General Assembly as an entity remain grossly diluted, despite the enactment of the temporary, "stop-gap" legislation which reapportioned the House of Delegates to give the more populous political subdivisions a slight majority. Actually, appellants' rights of representation would have been better protected by reapportioning the Senate and leaving the House of Representatives as it was before May 25, 1962. Certainly, from the point of view of the degree of malapportionment present, it was the Senate rather than the House which presented the more shocking example of a grossly unrepresentative legislative body.

What the Court of Appeals for Maryland has approved is not a "checks and balance" system, but government by paralysis. If it is reasonable to protect minority rights to the extreme of allowing a group or an area to retain

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And, therefore, the people when the legislative is once constituted, having in such a government as we have been speaking of no power to act as long as the government stands, this inconvenience is thought incapable of a remedy.

"*Salus populi suprema lex* is certainly so just and fundamental a rule, that he who sincerely follows it cannot dangerously err. If, therefore, the executive who has the power of convoking the legislative, *observing rather the true proportion than fashion of representation, regulates not by old custom, but true reason, the number of members in all places, that have a right to be distinctly represented*, which no part of the people, however incorporated, can pretend to, but in proportion to the assistance which it affords to the public, it cannot be judged to have set up a new legislative, but to have restored the old and true one, and to have rectified the disorders which succession of time had insensibly as well as inevitably introduced; for it being the interest as well as intention of the people to have a fair and equal representative, whoever brings it nearest to that is an undoubted friend to and establisher of the government, and cannot miss the consent and approbation of the community; . . ." (Emphasis supplied).

majority control of one house of a state legislature, whatever the population ratios of the political subdivisions within the State, appellants can suggest a number of groups, the members of which are as much in need of such extravagant and unreasonable protection as is now afforded the residents residing in the less populous subdivisions of Maryland. For example, 17% of the people of Maryland are non-white. By the logic on which the decision below rests, their rights can only be protected by giving them majority control of one branch of the General Assembly of Maryland!

For better or for worse, the people of the United States and, if given the chance once again, the people of Maryland, follow the principle of majority rule. It may be that democracy is no more than the "recurrent suspicion that more than half the people are right more than half of the time."[70] Nevertheless, it is the overriding principle which we believe the Fourteenth Amendment requires be observed in the composition of the legislative bodies of the States. The basic purpose in having a two-house state legislature is to insure that it is *more*, not *less*, representative of the body politic. Accordingly, minority rule, even if allowed in just one house of a state legislature, stultifies the legislative process, robs the principle of majority rule of any working vitality, and flouts both equal protection and due process of law. It is true, that many clever philosophical defenses of minority rule and government by an elite have been made throughout the ages. Plato's Republic is a classic example.[71] However, there are few Platos in the

[70] Mayo, An Introduction to Democratic Theory (Oxford Univ., 1960), pp. 174-175.

[71] Plato, *Republic*, 7 Great Books Ed., 295. For a criticism of Plato's theory of minority rule by a philosophical elite, see Russell, History of Western Philosophy (Simon and Schuster: N.Y., 1945), p. 108. Russell seems to have his own views about the elite (intellectual) that should have political power. That is the basic difficulty with minority rule—which minority is to be preferred?

less populous areas of Maryland; just about as many as are found elsewhere. Fortunately, the absence of such rare philosopher kings need not trouble us. Long ago this nation, as well as Maryland and the other states, accepted the principle of majority rule. After a long struggle, it has been restored in the House of Delegates, albeit on a thin and temporary basis. The time has come to permit the reintroduction of it in the Maryland State Senate, as originally contemplated by the reform of that body enacted in 1837. Radoff, *supra*, at p. 64.

IV

Applicable Standards and Effective Relief

A. *Applicable Standards.* An advocate's usual and primary obligation is to attempt to win his client's case within the bounds of the law, legal ethics and good taste. Very rarely, if ever, is he expected to argue for general standards to apply, not only in the litigation in which he is immediately involved, but in future cases as well. However, we realize that the reapportionment cases now before the Court raise fundamental issues of first impression. The Court, therefore, may be interested in hearing from counsel on the general standards which it might wish to lay down to control in apportionment cases. For that reason only, we digress slightly from the main stream of our argument to place before the Court appellants' views concerning the standards that might be taken into account when passing upon a claim that the representation provided in a state legislature violates the Fourteenth Amendment to the Constitution of the United States.

There can be little doubt that the most equitable standard, and the simplest to apply in all cases, is the "one man, one vote" concept which this Court laid down in *Gray* v. *Sanders, supra.* There may be differences which serve to dis-

tinguish the electoral from the representative process. For our part, however, we do not perceive these differences to be substantial. Therefore, if it were necessary to carry their case, appellants would repeat what was said earlier in this brief and argue that the concept of equality in suffrage rights requires that a strict population standard be adhered to in both Houses of the Maryland General Assembly, where it does not now prevail as to either.[72]

However, if the differences between voting in a statewide primary and voting for representatives to a state legislature are thought to justify some departure from the strict principle of electoral equality in the latter situation, then perhaps some slightly different standards may be observed in reapportionment cases. In appellants' view, however, the applicable standards ought to be no less than these:

(1) Whatever the minimum requirements of the Fourteenth Amendment in reapportionment cases, they must be the same everywhere; the Fourteenth Amendment binds all the States and can require no more or no less of Maryland than it does of Delaware, Oklahoma or Virginia.

(2) The constitutionality of the representation in a state legislature cannot depend on the fact that it is the result of legislative inaction rather than affirmative action; it is settled law that legislation which was constitutional when passed may become unreasonable as a result of changing conditions, *Baker* v. *Carr*, 369 U.S. 186, 254.

(3) The presence of a provision of a state constitution or statute requiring equitable apportionment of representa-

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[72] A three judge District court in Delaware seems to have adopted the strict population standard, with minor deviations in the Senate, for the State of Delaware. *Sincock* v. *Duffy*, 215 F. Supp. 169 (Del., 1963). As previously noted, a three judge Federal court in Western Oklahoma also has required reapportionment of both Houses on a strict population basis. *Moss* v. *Burkhart*, — F. Supp. — (W.D. Okla., 1963).

tion is of no consequence in determining whether or not an existing system of representation violates the Fourteenth Amendment; it is axiomatic that a violation of state law neither makes nor mars a violation of the Federal Constitution. *Snowden* v. *Hughes*, 321 U.S. 1, 11; *Nashville, C. & St. Louis R.* v. *Browning*, 310 U.S. 362, 363.

(4) Neither the true nor the theoretical availability of the initiative, the possibility of direct resort to the referendum process, or the opportunity for a constitutional convention as remedies against malapportionment, can save gross disparities in representation from condemnation as violations of the Fourteenth Amendment, whatever effect might be accorded to the presence of these political remedies in determining, in a particular case, whether a Federal court should grant injunctive relief against an unconstitutional malapportionment.[73]

(5) Under *all* circumstances, representation in at least one house of a state legislative body must be based *exclusively* on population. *Toombs* v. *Fortson*, 205 F. Supp. 248 (N.D. Ga., 1962). *Cf.*, Cox, *Current Constitutional Issues*, Address before the Tennessee Bar Association, Nashville, Tenn., June 8, 1962, p. 3.

(6) Under *no* circumstances, should the extent of permissible deviation from a strict population standard in a *second* house of a state legislature deny what may fairly

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[73] Professor McCloskey has advanced the interesting, but, we believe, unsupportable thesis that, in entering the so-called "thicket" of reapportionment, the judiciary should restrict itself to "procedural" considerations, that is, "whether the ultimate constituent power was being allowed an opportunity to express itself." McCloskey, *The Reapportionment Case*, 76 Harv. L.R. 54, 71-73 (1962). Appellants refuse to believe that fundamental voting rights, guaranteed by the Fourteenth Amendment, are to be judicially protected *only* in those situations where the majority has not been given the opportunity to say whether or not they should be upheld. However, even if this unique and restrictive understanding of the nature of the suffrage were sound law, the result in this case would be no different. The "constituent power" in Maryland, *i.e.*, the people, has not had a chance to express itself since 1867.

be regarded as a substantial majority of the citizens of a State from constituting a constitutional majority in that house. Hanson, *Courts in the Thicket: The Problem of Judicial Standards in Apportionment Cases*, 12 Amer. Univ. L.R. 51, 79-80 (1963).[74]

(7) Although population need not be the exclusive criterion in the second house in all situations, irrelevant considerations, such as area and geography, the amount of direct taxes paid,[75] "history and tradition," or special recognition for various economic or ethnic interests,[76] should *not* suffice to justify disparities of representation, whatever the percentage of the deviations which would result from application of the above listed extraneous factors.

(8) In *isolated* circumstances, the long-continued existence of important instrumentalities of American local self-government, such as counties or towns, perhaps might serve to excuse *slight* deviations from the strict population standard in *one* house of a legislature, *provided* that population "remains the strongly dominant factor" therein.[77]

(9) In permitting *minimum* recognition for units of local self-government in *one* house of a state legislature in unusual and compelling instances, in *no* event should the dis-

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[74] ". . . when the percentage [of population represented by a majority of members] slips below 45%, it can be suspected that there is substantial room for improvement in achieving reasonable equality of representation in the districting plan." David and Eisenberg, *Some Practical Issues in the Wake of Judicial Decision*, paper presented at the 58th Annual Meeting of the American Political Science Assoc., Washington, D.C., September 5, 1962, p. 8.

[75] *cf. Levitt* v. *Maynard*, 104 N.H. 243, 182 A. 2d 897, where such a system with respect to the New Hampshire Senate was sustained as not irrational, but under which, interestingly enough, the three largest cities of the State are slightly over-represented. *Id.* at 898.

[76] McKay, *Political Thickets and Crazy Quilts; Reapportionment and Equal Protection*, 61 Mich. L.R. 645, 696 (1963).

[77] McKay, *supra*, p. 700.

parities in representation which result therefrom be allowed to exceed a ratio of 1½ to 1. *Cf., Sincock* v. *Duffy*, 215 F. Supp. 169 (Del., 1963), appeal pending This Term, *sub nom. Roman* v. *Sincock*, No. 307.

(10) When the above slight disparities are tolerated, they should *not* be permitted as between areas of the *same class*, i.e., urban, but only as between different types or classes, i.e., urban and rural. *Cf. Baker* v. *Carr*, 369 U. S. 186, 254.

(11) The burden of proof should be on the state to justify the disparities for which relaxation of the strict population standard is sought. *Lisco* v. *McNichols*, 208 F. Supp. 471, 476 (D. Colo., 1962).

This Court has not as yet marked out the guidelines by which it will implement its monumental decision in *Baker* v. *Carr*. Diffidently, appellants hope that, should the Court not adhere to the principle of "one man, one vote" in reapportionment cases, then the standards suggested above might merit some consideration by the Court in arriving at a final determination of the problem. Still, however minimal the standards ultimately approved by this Court, it seems beyond argument to appellants that the gross disparities of representation now permitted in the Maryland General Assembly violate Section 1 of the Fourteenth Amendment, especially in respect of the State Senate. Therefore, unless the Court really meant no more than to establish a procedural point in *Baker*, and Professor Bickel is thus confirmed in his concern that this Court may be "unable to formulate a dominant principle applicable to legislative apportionment,"[78] the decision below surely cannot stand.

B. *Effective Relief Is Available.* There is no danger of impotent judicial relief in this case, should the Court

[78] Bickel, *Durability of Colgrove* v. *Green*, 72 Yale L. J. 39, 43 (1962).

agree that the Court of Appeals of Maryland is in error in approving as constitutional the representation now provided in the General Assembly of Maryland. The history of these proceedings is proof of that. Following this Court's decision in *Baker* v. *Carr*, an earlier opinion of the Maryland Court of Appeals in this case, 228 Md. 412, 180 A. 2d 656, and the ruling by the trial court that the representation formerly provided in the Maryland House of Delegates was in violation of the Fourteenth Amendment, the General Assembly acted speedily to rectify the defect, at least in part. The experience of over fifteen other states has been the same. Decisions of state and federal courts, whether voiding existing apportionment legislation, or asserting jurisdiction to do so, have been quickly followed by the passage of at least some apportionment legislation by the states concerned.[79]

Accordingly, appellants are confident that an authoritative decision by this Court should produce reasonably prompt reapportionment by the Maryland General Assembly. Of course, the judicial *minimum* will be the legislative *maximum*. And in the absence of a controlling decision by this court, it is demonstrably futile to hope that the Maryland General Assembly, or any other State legislature, will take effective steps to reapportion itself in an equitable manner. A favorable holding, on the other hand, will bolster both the determination and the ingenuity with which the lower courts of the country have thus far tackled and seem to have solved the problem of the relief to be granted in a successful reapportionment suit.

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[79] McKay, *supra*, pp. 706-710; *Washington Post & Times Herald*, March 24, 1963, p. C-1.

Conclusion

For the reasons stated herein, appellants respectfully request that the Court reverse the judgment of the Court of Appeals of Maryland, and remand the case there. They further ask that it mandate that Court to direct the Circuit Court for Anne Arundel County to enter an order declaring Article III, Section 2, of the Maryland Constitution to be in violation of the Fourteenth Amendment, instructing the Chancellor to retain jurisdiction of the case pending corrective action on the part of the Maryland General Assembly with respect to the representation now provided in both the Senate and House of Delegates thereof, with further authority in the trial court to issue such injunctive relief as subsequently might be required should the General Assembly of Maryland not act prior to January 1, 1966.

Respectfully submitted,

ALFRED L. SCANLAN,
9806 Singleton Drive,
Bethesda, Maryland.

JOHN B. WRIGHT,
12 Church Circle,
Annapolis, Maryland.

SHEA & GARDNER,
734 15th Street, N.W.,
Washington 5, D.C.

JOHNSON BOWIE,
22 West Pennsylvania Ave.,
Towson 4, Maryland.

Of Counsel.

Attorneys for the Appellants.

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APPENDIX A

1. Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Article III, Section 2, of the Maryland Constitution provides that:

> The City of Baltimore shall be divided into six legislative districts as near as may be of equal population and of contigous territory, and each of said legislative districts of Baltimore City, as they may from time to time be laid out, in accordance with the provisions hereof, and each county in the State, shall be entitled to one Senator, who shall be elected by the qualified voters of the said legislative districts of Baltimore City and of the counties of the State, respectively, and shall serve for four years from the date of his election, subject to the classification of Senators hereafter provided for.

3. Article III, Section 5, of the Maryland Constitution (now inoperative) provided that:

> Notwithstanding the provisions of Section 4 of this Article, the membership of the House of Delegates shall consist of one hundred and twenty-three (123) Delegates, apportioned as follows: Calvert, Caroline, Charles, Howard, Kent, Queen Anne's, and St. Mary's Counties, two Delegates each; Cecil, Garrett, Somerset, Talbot and Worcester Counties, three Delegates each; Carroll, Dorchester, Harford, and Wicomico Counties,

four Delegates each; Allegany, Anne Arundel, Baltimore, Frederick, Montgomery, Prince Georges, and Washington Counties, and each of the six legislative districts of Baltimore City, six Delegates each.

4. Chapter 1, Acts of the Special Session, Maryland General Assembly, May, 1962, now Art. 40, Sec. 42, Code of Md. (1962 Supp.), reads as follows:

AN ACT to add a new Section 42 to Article 40 of the Annotated Code of Maryland (1957 Edition), title "General Assembly" to follow immediately after Section 41 thereof, and to be under the new sub-title "Apportionment", revising the provisions concerning the membership of the House of Delegates and the representation of the several political sub-divisions therein, making provision for the nomination and election of certain candidates for office in the House of Delegates, ~~MAKING AN EMERGENCY APPROPRIATION TO THE BOARD OF PUBLIC WORKS FROM THE GENERAL FUND SURPLUS OF THE STATE TREASURY FOR THE FISCAL YEAR ENDING JUNE 30, 1963, TO BE USED IN WHOLE OR IN PART BY THE BOARD OF PUBLIC WORKS TO PAY A PORTION OF THE COST OF SPECIAL PRIMARY ELECTIONS FOR THIS PURPOSE,~~ and relating generally to the membership and election of the members of the House of Delegates of Maryland ~~AND TO AN EMERGENCY APPROPRIATION FROM THE STATE TREASURY FOR THE PAYMENT OF A PORTION OF THE COST OF SPECIAL ELECTIONS UNDER THIS ACT~~.

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That new Section 42 be and it is hereby added to Article 40 of the Annotated Code of Maryland (1957 Edition), title "General Assembly" to follow immediately after Section 41 thereof, and to be under the new sub-title "Apportionment", and to read as follows:

42.

(a) The membership of the House of Delegates shall consist of one hundred and twenty-three Delegates. Each county and each legislative district of Baltimore City shall have two Delegates as a minimum, making a total of fifty-eight (58) Delegates. The remaining sixty-five (65) Delegates shall be apportioned on a basis of relative population, as in this section provided.

(b) ~~After and based upon the final official publication of the Federal census of 1970, and after such publication of each decennial Federal census thereafter, there~~ THERE *shall be an apportionment of representation in the House of Delegates in the following manner: Within one year after the publication of each census the Governor by proclamation shall announce the population determined in the census for each county and for each legislative district of Baltimore City. If the Federal census does not determine the population by legislative districts in Baltimore City, the Governor shall estimate the population of the several legislative districts by using the Federal census figures for wards and blocks within the City, or if that method is impractical, then by such other reliable method as may be feasible; and the Governor's determination of the population of each legislative district shall be conclusive. In the proclamation the Governor also shall announce the number of Delegates to which each county and legislative district is entitled according to the formula and requirements contained in this section. At the time of the next regular election to the House of Delegates following such proclamation the number of Delegates specified in the proclamation shall be elected in the counties and legislative districts respectively. The apportionment above made shall continue until changed under the provisions of this section.*

(c) Each county and each legislative district of Baltimore City shall be entitled to the minimum representation in the House of Delegates provided for in sub-section (a) of this section. Additional representation, subject to a total of sixty-five (65) additional Delegates and based on the population of each county and each legislative district as

determined by each official decennial Federal census, shall be in accordance with the following formula:

~~*The total population of the State according to the census shall be divided by the number sixty-five (65). The resulting quotient, computed to the nearest whole number, is the unit of population necessary for an additional Delegate. The unit of population, as divisor, shall then be divided into the population of each county in the State and of each legislative district of Baltimore City which has a population in excess of the unit of population. Each county and legislative district shall receive an additional number of Delegates equal to the resulting quotient in each instance, dropping any fractional remainder. If the total number of Delegates so apportioned is fewer than one hundred and twenty-three (123), additional Delegates shall be awarded in descending order to those counties or legislative districts having the highest fractional share of a unit of population as a remainder after the last mentioned quotients have been computed, until the total of one hundred and twenty-three (123) Delegates is apportioned.*~~

THE TOTAL POPULATION OF THE STATE ACCORDING TO THE CENSUS SHALL BE DIVIDED BY THE NUMBER SIXTY-FIVE (65). THE RESULTING QUOTIENT, COMPUTED AS THE NEAREST WHOLE NUMBER, IS THE UNIT OF POPULATION NECESSARY FOR AN ADDITIONAL DELEGATE. THE UNIT OF POPULATION, AS DIVISOR, SHALL THEN BE DIVIDED INTO THE POPULATION OF EACH COUNTY IN THE STATE AND OF EACH LEGISLATIVE DISTRICT OF BALTIMORE CITY WHICH HAS A POPULATION IN EXCESS OF THE UNIT OF POPULATION. EACH COUNTY AND LEGISLATIVE DISTRICT SHALL RECEIVE AN ADDITIONAL NUMBER OF DELEGATES EQUAL TO THE RESULTING QUOTIENT IN EACH INSTANCE, DROPPING ANY FRACTIONAL REMAINDER. IF THE TOTAL NUMBER OF DELEGATES SO APPORTIONED IS

FEWER THAN ONE HUNDRED AND TWENTY-THREE (123), ADDITIONAL DELEGATES SHALL BE AWARDED IN DESCENDING ORDER TO THOSE COUNTIES OR LEGISLATIVE DISTRICTS HAVING THE HIGHEST FRACTIONAL SHARE OF A UNIT OF POPULATION AS A REMAINDER AFTER THE LAST MENTIONED QUOTIENTS HAVE BEEN COMPUTED, UNTIL THE TOTAL OF ONE HUNDRED AND TWENTY-THREE (123) DELEGATES IS APPORTIONED.

~~THE TOTAL POPULATION OF THE STATE ACCORDING TO THE CENSUS SHALL BE DIVIDED BY THE NUMBER ONE HUNDRED AND TWENTY-THREE (123). THE RESULTING QUOTIENT, TAKEN TO THE NEAREST FIGURE OF AN EVEN THOUSAND, IS THE UNIT OF POPULATION UNTIL A SIMILAR COMPUTATION IS MADE FOLLOWING THE NEXT CENSUS. THE UNIT OF POPULATION SHALL THEN BE DIVIDED INTO THE POPULATION OF EACH COUNTY IN THE STATE AND EACH LEGISLATIVE DISTRICT OF BALTIMORE CITY. EACH COUNTY AND LEGISLATIVE DISTRICT SHALL RECEIVE AN AGGREGATE NUMBER OF DELEGATES (WHICH INCLUDES ITS MINIMUM OF TWO DELEGATES) AS ITS POPULATION EXCEEDS THE NUMBER OF UNITS OF POPULATION LISTED IN THE FOLLOWING SCHEDULE:~~

~~WHEN THE POPULATION OF THE COUNTY OR LEGISLATIVE DISTRICT EXCEEDS THIS NUMBER OF UNITS OF POPULATION~~	~~THE COUNTY OR LEGISLATIVE DISTRICT IS ENTITLED TO THIS TOTAL NUMBER OF DELEGATES~~
~~ONE UNIT SUBDIVISIONS~~	
~~2~~	~~3~~
~~3~~	~~4~~

TWO UNIT SUB-DIVISIONS	
4	5
6	6
8	7
THREE UNIT SUB-DIVISIONS	
10	8
13	9
16	10
FOUR UNIT SUB-DIVISIONS	
19	11
23	12

ALSO, FOR EVERY FOUR ADDITIONAL UNITS OF POPULATION IN EXCESS OF TWENTY THREE UNITS, THE COUNTY OR LEGISLATIVE DISTRICTS SHALL RECEIVE ONE ADDITIONAL DELEGATE.

IF THE TOTAL NUMBER OF ALL DELEGATES SO APPORTIONED IS FEWER THAN ONE HUNDRED AND TWENTY THREE (123) DELEGATES, ADDITIONAL DELEGATES SHALL BE AWARDED IN DESCENDING ORDER TO THOSE COUNTIES OR LEGISLATIVE DISTRICTS HAVING MORE THAN ONE UNIT OF POPULATION AND HAVING THE HIGHEST FRACTIONAL SHARE OF A UNIT OF POPULATION AS A REMAINDER AFTER THE QUOTIENTS HAVE BEEN COMPUTED IN APPLYING THE TABULAR FORMULA ABOVE, UNTIL THE TOTAL OF ONE HUNDRED AND TWENTY THREE (123) DELEGATES IS APPORTIONED.

IN COMPUTING THE "HIGHEST FRACTIONAL SHARE" OF A UNIT OF POPULATION, REMAINDERS FOR COUNTIES OR LEGISLATIVE DISTRICTS UNDER THE FOUR SUB-HEADINGS IN THE TABULAR FORMULA ABOVE SHALL BE

~~GIVEN WEIGHTED VALUES AS FOLLOWS: FOR COUNTIES AND LEGISLATIVE DISTRICTS WHICH ARE "ONE UNIT SUB-DIVISIONS," THE REMAINDER POPULATION SHALL BE MULTIPLIED BY FOUR; FOR COUNTIES AND LEGISLATIVE DISTRICTS WHICH ARE "TWO UNIT SUB-DIVISIONS," THE REMAINDER POPULATION SHALL BE MULTIPLIED BY THREE; FOR COUNTIES AND LEGISLATIVE DISTRICTS WHICH ARE "THREE UNIT SUB-DIVISIONS," THE REMAINDER POPULATION SHALL BE MULTIPLIED BY TWO; AND FOR COUNTIES AND LEGISLATIVE DISTRICTS WHICH ARE "FOUR UNIT SUB-DIVISIONS," THE REMAINDER POPULATION SHALL BE MULTIPLIED BY ONE. THESE WEIGHTED VALUES (AND NOT THE SIMPLE ARITHMETIC VALUES) THEN SHALL BE USED IN COMPUTING THE "HIGHEST FRACTIONAL SHARE" OF A UNIT OF POPULATION IN AWARDING ADDITIONAL DELEGATES AS REMAINDERS.~~

~~IF AFTER ALL THESE COMPUTATIONS THE TOTAL NUMBER OF ALL DELEGATES SO APPORTIONED IS FEWER THAN ONE HUNDRED AND TWENTY-THREE (123) DELEGATES, ADDITIONAL DELEGATES SHALL BE AWARDED IN DESCENDING ORDER OF POPULATION TO THOSE COUNTIES OR LEGISLATIVE DISTRICTS HAVING A POPULATION LESS THAN ONE UNIT OF POPULATION, UNTIL THE TOTAL OF ONE HUNDRED AND TWENTY-THREE (123) DELEGATES IS APPORTIONED.~~

(d) Not later than December 31, 1965, the Governor shall make the estimations of population and the proclamation required in subsection (b), based upon the Federal census of 1960. The primary and general elections for the House of Delegates during the year 1966 ~~AND THE YEAR 1970~~ *shall be for such number of Delegates in each county and legislative district as previously determined under the provisions of this sub-section; and this section is fully effective when the House of Delegates which is elected in November, 1966, has qualified and entered upon its term of office.*

(e) Notwithstanding anything to the contrary in sub-sections (a), (b), (c) and (d) of this section, during the four-year term of the House of Delegates which is elected to office in November, 1962, AND FOR ANY ADDITIONAL PERIOD DURING WHICH THIS SECTION MAY BE EXTENDED *each county and legislative district as a minimum shall have the number of Delegates in the House of Delegates that it had on January 1, 1962. For those four years, the formula for membership in sub-section (c)* BASED UPON THE FEDERAL CENSUS OF 1960 *shall be applied as to those counties and legislative districts for which it provides an increase in representation, but the formula shall not be applied as to those counties and legislative districts for which it would provide a decrease in representation, or as to which it leaves representation unchanged.*

~~*(f) In accordance with the formula in sub-section (c), the number of additional memberships in the House of Delegates, for which nominations are to be made by the local central committees, is as follows: Anne Arundel County, 1; Baltimore County, 7; Montgomery County, 4; Prince George's County, 4; Third District of Baltimore City, 2; Fifth District of Baltimore City, 1.*~~

~~*(g) The local central committee of each party which was elected on May 15, 1962, in the several counties or legislative districts respectively, shall nominate persons as candidates for the House of Delegates for the additional memberships herein created. These nominations shall be made prior to August 1, 1962.*~~

(F) IN ACCORDANCE WITH THE FORMULA IN SUB-SECTION (C), THE NUMBER OF ADDITIONAL MEMBERSHIPS IN THE HOUSE OF DELEGATES, FOR WHICH NOMINATIONS ARE TO BE MADE BY THE LOCAL CENTRAL COMMITTEES, IS AS FOLLOWS: ANNE ARUNDEL COUNTY, 1; BALTIMORE COUNTY, 7; MONTGOMERY COUNTY, 4; PRINCE GEORGE'S COUNTY, 4; THIRD DISTRICT OF BALTIMORE CITY, 2; FIFTH DISTRICT OF BALTIMORE CITY, 1.

(G) THE LOCAL CENTRAL COMMITTEE OF EACH PARTY WHICH WAS ELECTED ON MAY 15, 1962, IN THE SEVERAL COUNTIES OR LEGISLATIVE DISTRICTS RESPECTIVELY, SHALL NOMINATE PERSONS AS CANDIDATES FOR THE HOUSE OF DELEGATES FOR THE ADDITIONAL MEMBERSHIPS HEREIN CREATED. THESE NOMINATIONS SHALL BE MADE PRIOR TO AUGUST 1, 1962.

~~(F) (I) IN THOSE COUNTIES AND LEGISLATIVE DISTRICTS FOR WHICH THERE IS AN INCREASE IN REPRESENTATION, A SPECIAL PRIMARY ELECTION, BUT ONLY FOR SUCH INCREASED REPRESENTATION IN THE HOUSE OF DELEGATES, SHALL BE CONDUCTED ON TUESDAY, JULY 17, 1962. CERTIFICATES OF CANDIDACY FOR THIS PRIMARY ELECTION SHALL BE FILED NOT LATER THAN MIDNIGHT ON MONDAY, JUNE 11, 1962. THE FINAL TIME TO WITHDRAW AS A CANDIDATE IS MIDNIGHT ON FRIDAY, JUNE 15, 1962. THIS ELECTION IS DECLARED TO BE A "PRIMARY ELECTIONS" WITH RESPECT TO PROVISIONS IN ARTICLE 22 OF THIS CODE, TITLE "ELECTIONS" WHICH CONCERNS THE REGISTRATION OF VOTERS.~~

~~(II) EXCEPT AS IN THIS SECTION OTHERWISE SPECIFICALLY PROVIDED, THE PROVISIONS OF SAID ARTICLE 22 CONCERNING THE REGISTRATION OF VOTERS AND THE CONDUCT OF PRIMARY ELECTIONS IN THIS STATE AND IN THE RESPECTIVE POLITICAL SUB-DIVISIONS OF THIS STATE APPLY WITHIN THE PARTICULAR POLITICAL SUB-DIVISIONS IN WHICH THE SPECIAL PRIMARY ELECTIONS ARE HELD.~~

~~(III) THE BOARD OF SUPERVISORS OF ELECTIONS IN EACH SUCH POLITICAL SUB-DIVISION, AND ALL OTHER OFFICIALS AND EMPLOYEES OF THIS STATE AND OF THE RESPECTIVE POLITICAL SUB-DIVISIONS, SHALL DO THOSE THINGS~~

~~WHICH ARE NECESSARY AND PROPER TO ARRANGE FOR AND CONDUCT THESE SPECIAL PRIMARY ELECTIONS.~~

~~(IV) THERE IS APPROPRIATED TO THE BOARD OF PUBLIC WORKS, AS AN EMERGENCY APPROPRIATION FROM THE GENERAL FUND SURPLUS OF THE STATE TREASURY FOR THE FISCAL YEAR ENDING JUNE 30, 1962, THE SUM OF TWO HUNDRED THOUSAND DOLLARS ($200,000). THIS APPROPRIATION SHALL BE USED IN WHOLE OR IN PART BY THE BOARD OF PUBLIC WORKS FOR THE PAYMENT OF ONE-HALF OF THE COST OF THE SPECIAL ELECTION IN EACH OF THE SEVERAL COUNTIES AND LEGISLATIVE DISTRICTS IN WHICH UNDER THE PROVISIONS OF THIS SECTION CERTAIN ADDITIONAL CANDIDATES ARE TO BE NOMINATED FOR MEMBERSHIP IN THE HOUSE OF DELEGATES. IF ANY PORTION OF THIS APPROPRIATION IS NOT EXPENDED ON SEPTEMBER 30, 1962, IT SHALL REVERT TO THE GENERAL FUNDS OF THE STATE TREASURY.~~

~~(G) (h) The nominees, in the respective numbers indicated in sub-section (f), shall be so declared. They shall become nominees for~~

(H) THE NOMINEES, IN THE RESPECTIVE NUMBERS INDICATED IN SUB-SECTION (F), SHALL BE SO DECLARED. THEY SHALL BECOME NOMINEES FOR *the particular party and in the particular county or legislative district, for the purposes of the general election in the month of November, 1962, in all respects the same as nominees already selected by the primary election of May 15, 1962, for the particular party and in the particular county or legislative district. All nominees so nominated by the* ~~*local central committees*~~ ~~SPECIAL PRIMARY ELECTIONS PROVIDED FOR HEREIN~~ LOCAL CENTRAL COMMITTEES *who are elected to office at the general election in November, 1962, and who subsequently are sworn into office as members of the House of Delegates of*

Maryland, have all the powers, privileges and duties accorded generally to members of the House of Delegates.

~~(H)~~ (I) ~~(i)~~ *Nothing in this section shall be construed or applied to change or in any manner to affect the party conventions held pursuant to Article 33 of the Annotated Code of Maryland, title "Elections," during the year 1962.*

~~(I)~~ (J) ~~(j)~~ *This section establishes the membership of the House of Delegates of Maryland until such time as it is superseded by an amendment for that purpose to the Constitution of Maryland. This section automatically and with no further action required by the General Assembly is repealed and no longer in force as of the effective date of such an amendment to the Constitution; except that such repeal does not affect the election, tenure, powers, privileges, and duties of any member of the House of Delegates in office at the time of the repeal, for the remainder of the term for which he has been elected.*

SEC. 2. *And be it further enacted*, That this Act shall take effect on June 1, 1962. IF THIS ACT HAS NOT ALREADY BEEN SUPERSEDED BY AN AMENDMENT TO THE CONSTITUTION OF MARYLAND UNDER THE PROVISIONS OF SUCH SUB-SECTION (J) HEREINABOVE, IT SHALL EXPIRE AUTOMATICALLY AND WITH NO FURTHER ACTION REQUIRED BY THE GENERAL ASSEMBLY OF MARYLAND ON JANUARY 1, 1966; PROVIDED, HOWEVER, THAT IF AT THE GENERAL ELECTION IN THE MONTH OF NOVEMBER 1964 THERE IS SUBMITTED TO THE VOTERS OF THE STATE OF MARYLAND A PROPOSED CONSTITUTIONAL AMENDMENT WHICH WOULD SO SUPERSEDE THE PROVISIONS OF THIS SECTION, AND IF AT THAT TIME THE VOTERS OF THE STATE OF MARYLAND REJECT AND DO NOT RATIFY THIS PROPOSED CONSTITUTIONAL AMENDMENT AND THE PROVISIONS OF THIS ACT SHALL EXPIRE AUTOMATICALLY AND WITH NO FURTHER ACTION REQUIRED BY THE

GENERAL ASSEMBLY OF MARYLAND ON JANUARY 1, 1970. IN THE EVENT THERE IS SUCH AN AUTOMATIC REPEAL OF THIS SECTION EITHER IN 1966 OR 1970 AS PROVIDED HEREINABOVE, THE MEMBERSHIP OF THE HOUSE OF DELEGATES OF MARYLAND THEREAFTER SHALL BE THE SAME AS IT WAS IN THE SEVERAL POLITICAL SUB-DIVISIONS AND IN ITS ENTIRETY ON JANUARY 1, 1962. NOTHING IN SUCH A REPEAL EITHER IN 1966 OR 1970 SHALL AFFECT THE ELECTION, TENURE, POWERS, PRIVILEGES, AND DUTIES OF ANY MEMBER OF THE HOUSE OF DELEGATES IN OFFICE AT THE TIME OF THE REPEAL FOR THE REMAINDER OF THE TERM FOR WHICH HE HAS BEEN ELECTED.

Approved May 31, 1962.

(7694-3)